SUPREME COURT, U.S.

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No. 669

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED NATIONAL LIFE INSURANCE COMPANY,
PIONEER LIFE INSURANCE COMPANY and
NATIONAL LIBERTY LIFE INSURANCE COMPANY,
Appellants,

v.

STATE OF CALIFORNIA, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

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No.

UNITED NATIONAL LIFE INSURANCE COMPANY, PIONEER LIFE INSURANCE COMPANY and NATIONAL LIBERTY LIFE INSURANCE COMPANY,
Appellants,

v.

STATE OF CALIFORNIA, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

The appellants, United National Life Insurance Company, Pioneer Life Insurance Company and National Liberty Life Insurance Company appeal from a judgment of the California Supreme Court entered on May 4, 1967.

OPINIONS BELOW

The opinion of the California Supreme Court (Appendix A, p. 1a, *infra*) is reported at 58 Cal. Rptr. 599, 427 P.2d 199. The opinion of the California District

Court of Appeal for the Second Appellate District (Appendix B, p. 28a, *infra*), is reported at 53 Cal. Rptr. 636. The opinions of the California Superior Court for Los Angeles County (Appendix C, p. 39a, *infra*) are unreported.[1]

JURISDICTION

This action was commenced by appellee in the California Superior Court for Los Angeles County seeking to obtain injunctive relief against appellants pursuant to Section 12928.6 of the California Insurance Code.

The opinion of the California Supreme Court (Appendix A, p. 1a, *infra*) constitutes the judgment of that court under California practice. It was filed on May 4, 1967. Appellants filed notices of appeal in the California Supreme Court on August 2, 1967. The jurisdiction of this Court on appeal is conferred by 28 U.S.C. § 1257(2), and sustained by *Hamilton* v. *Regents*, 293 U.S. 245, and *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause (Art. I, § 8), the Supremacy Clause (Art. VI) and the Due Process Clause of the 14th Amendment of the Constitution of the United States; the McCarran-Ferguson Act (15 U.S.C. §§ 1011-15) and Section 700 of the California Insurance Code are set forth in Appendix D hereto, p. 41a, *infra*.

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[1] The record filed in this Court consists principally of a Clerk's Transcript for each appellant, references to which will be designated respectively "UN Clk. Tr.," "P Clk. Tr.," and "NL Clk. Tr."

QUESTION PRESENTED

Where an insurance company domiciled outside California and regulated by its state of domicile has not sought or received a license from California and maintains no agents, other representatives, place of business or property in California but solicits and communicates with California residents exclusively through the mails, is a California statute that prohibits the company from engaging in this interstate solicitation and communication until it has obtained a license and thereby submitted to state taxation and state regulation of its business operations and internal structure invalid under limitations imposed by the McCarran-Ferguson Act of 1945, and the Supremacy Clause, the Commerce Clause and the Due Process Clause of the 14th Amendment of the Constitution.

STATEMENT OF THE CASE

Background of the Litigation

Appellants are three corporations engaged in the sale of life and accident and health insurance by mail: United National Life Insurance Company, Pioneer Life Insurance Company, and National Liberty Life Insurance Company, incorporated respectively in Arizona, Illinois and Pennsylvania. The central question presented by this appeal concerns the asserted power of appellee, the State of California, to regulate the business operations and internal structure of these corporations.

The characteristic that distinguishes appellants' operations from those of most other insurance companies is the fact that in most states appellants solicit and contract with their customers solely through the mail instead of through resident agents. The insurance of-

fered by appellants is advertised and described in letters and other materials sent by mail from the appellants' headquarters to prospective customers in numerous states throughout the country. Persons interested in purchasing policies return by mail applications for policies which are then issued at the home office and mailed to the applicants.[2] Subsequent payment of premiums is effected through the mail. None of appellants has sought to be licensed by California. None has within the State any office or any representative or agent or any other person engaged in solicitation on its behalf.[3]

Appellants are broadly regulated by their respective states of domicile with respect to their capitalization and financial structure, the terms and form of their policies, their business practices, their investments and other aspects of their operations.[4] Because of their use of and reliance upon the channels and instrumentalities of interstate commerce, appellants are also subject to federal regulation. The Federal Trade Commission has exercised its power to ensure fair business practices in interstate commerce by prescribing detailed rules, fully applicable to appellants, governing the advertisement and description of policies. 16 C.F.R. § 14.11. See *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293.

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[2] United varies this practice in the case of one type of the policies it writes by sending a pre-endorsed policy that can be accepted by returning the application with the initial premium.

[3] In this respect appellants' method of conducting their business differs significantly from the method of the insurance company involved in Ministers Life & Cas. Union v. Haase, 385 U.S. 205. In that case the company used "group leaders" in Wisconsin in the solicitation and negotiation of business. See p. 17, *infra*.

[4] Ariz. Rev. Stats., tit. 20; Ill. Ann. Stats., ch. 73; Penn. Stats. Ann., tit. 40.

The Post Office can and does act administratively to foreclose use of the mails to companies found to operate fraudulently. 39 C.F.R. §§ 124.1, 124.5. In addition the Department of Justice has power to prosecute for use of the mails to defraud. 18 U.S.C. § 1341. See, *e.g., United States* v. *Sylvanus,* 192 F.2d 96 (7th Cir. 1951).

By conducting their operations by mail from a single headquarters, companies such as appellants avoid the heavy expense of maintaining local offices and paying commissions to resident agents. This method of operation has been responsible for the growth of mail order insurance companies and is critical to the economic function they perform. It has enabled the mail order insurance companies to enter, and to survive in, a market that is otherwise dominated by much larger corporations whose resources and volume allow them to operate nationwide through a system of local offices and agents. In some instances, mail order insurance companies offer protection at substantial savings over prevailing rates.[5]

Many of the mail order companies began by directing their services to particular classes of customers with special needs, for example, members of particular professions or callings, religious institutions or persons falling into particular age groups.[6] Because the companies were dealing with a limited and often widely dispersed clientele it was natural for them to conduct their operations entirely by mail. Indeed often the volume of

[5] Brief for the Church Fire Ins. Corp., et al., as Amici Curiae, p. 3, State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451. See also Hearings on H.R. 687 Before the House Committee on the Post Office and Post Roads, 78th Cong., 1st Sess. 21.

[6] See Hearings on H.R. 687 Before the House Committee on the Post Office and Post Roads, 78th Cong., 1st Sess. 20-21, 38, 44, 61-62, 65-66.

business of a company from particular states was not sufficient to justify the expense of obtaining a license and meeting the special regulatory requirements of those states.

A number of the mail order insurance companies have continued to confine their business to particular classes of persons or institutions. Others have expanded their operations by offering insurance to the general public. But even when these companies have expanded their operations they have continued to supply the insurance needs of groups or classes of the population that are not always reached or adequately served by the companies that operate through local offices and agents. For example, the mail order companies offer life and health and accident policies so modest in amount that the annual premiums, and hence the agents' commissions, are not sufficiently great to attract the sales efforts of agents and hence in realistic terms are made available to the public only by the mail order companies.

Until these cases arose California made no attempt to superimpose upon the domiciliary state and federal regulation to which appellants are already subject its own elaborate code governing domestic insurers and foreign companies whose use of local offices and resident agents requires them to be licensed in California. On the contrary the State acknowledged only a few years ago that state regulatory law did not and could not constitutionally apply to foreign insurers doing business by mail. In 1961 the California Department of Insurance stated: "The laws of this State do not, and it is our understanding that they could not constitutionally regulate the transaction of insurance through the United States mails."[7]

[7] UN Clk. Tr. 37, P Clk. Tr. 15, NL Clk. Tr. 28.

The Proceedings Below

The State began this case in 1965 by filing complaints in the Superior Court for Los Angeles County seeking to enjoin the three appellants from insuring California residents through the mails until they comply with the provisfons of Section 700 of the Insurance Code of California. That section provides in substance that a person may not transact any class of insurance business in California without procuring a certificate of authority from the Commissioner of Insurance and conforming to all the requirements of the California Code applicable to insurance companies. The complaints alleged no contacts between appellants and California other than the mailing of correspondence between appellants and their existing and prospective customers in California, but charged that this activity without more constituted the carrying on of an "insurance business in this State" within the meaning of Section 700 of the California Insurance Code.[8]

Each appellant in its answer alleged that the application of the California statutes in the manner sought would unconstitutionally burden interstate commerce, violate the Supremacy Clause and the Due Process Clause of the 14th Amendment of the Federal Constitution, and conflict with the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15.

The cases were tried on a stipulation of facts stating that the three appellants are engaged in the business of underwriting and selling insurance by mail; that their only offices are located outside California in the

[8] The complaints did not allege that any of the appellants had engaged in any fraudulent, deceptive, unfair or otherwise unlawful practices in the conduct of their business and the State made no such claim at any stage of the proceeding.

states of their incorporation; that appellants have mailed to California residents from their out-of-state offices application forms and literature inviting Californians to apply for insurance; that they have issued insurance policies through the mails to California residents; and that they have collected premiums for this insurance by mail received at their out-of-state offices from California residents.* On the basis of these facts alone the State contended that it was entitled to prohibit appellants from using the interstate mails to conclude insurance transactions with residents of California unless appellants obtained a license from the State and thereby subjected themselves to its regulatory and taxing authority.

The Superior Court, on cross motions for summary judgment, ruled that "constitutionally, the State of California is without power to regulate this type of mail-order insurance business, where defendant has no offices, employees, or agents in California" and deals with residents only by mail. (Appendix C, p. 39a, *infra*).

The District Court of Appeal reversed this decision. The California Supreme Court granted a hearing and held that appellants are subject to Section 700 and "that such regulation comports with applicable criteria of federal due process and is free of conflict with any federal law or regulation" (Appendix A, pp. 1a-2a, *infra*), and remanded the case to the Superior Court for the entry of judgment in conformity with its opinion. Those judgments were entered on August 23, 1967.

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* UN Clk. Tr. 15-17; P Clk. Tr. 13-15; NL Clk. Tr. 28-29.

THE QUESTION PRESENTED IS SUBSTANTIAL

This appeal presents a substantial federal question of importance that deserves plenary consideration by the Court. Extension of the application of California's broad regulatory statute to insurers having no office, property, or agent or other representative in the State and operating solely by mail is in conflict with the McCarran-Ferguson Act as interpreted and applied by this Court in *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, and also in conflict with established federal limitations applied most recently only last Term in *National Bellas Hess* v. *Dept. of Revenue*, 386 U.S. 753, decided after the California court's decision.[10] The contrary conclusion of the California court rests largely upon a misapplication of *Ministers Life & Cas. Union* v. *Haase*, 385 U.S. 205, a case presenting controlling factual differences from the present cases.

The decision below if allowed to stand will have consequences that transcend the specific application of California law here involved. It will enable every state in the Union to assert similar regulatory and taxing authority over the interstate operations of mail order insurance companies and most, if not all, of the states will doubtless avail themselves of this authority.[11] The mail order insurance companies may well be forced to abandon their present method of conduct-

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[10] As we shall show below, the fact that *National Bellas Hess* did not involve application of the McCarran-Ferguson Act makes the case an *a fortiori* precedent here. See pp. 19-20, *infra*.

[11] In addition to California, the states of Colorado, Florida, Iowa, Maryland, Michigan, Minnesota, New Hampshire, North Carolina, Ohio, Oregon, Texas, Washington, West Virginia and Wisconsin have already sought to regulate the operations of mail order insurance companies who issue insurance policies to their residents through the mail.

ing their business through the mails and, unless they are able to conform to the methods of the insurance companies which sell insurance on an agency basis, to go out of business entirely. In any event subjection of these companies to the varying and complex regulatory patterns of fifty states is certain to have substantial adverse effects upon their interstate operations.

It is anomalous that the single "contact" that California has seized upon in its attempt to subject appellants to its local regulation is appellants' use of the mails, which are a basic channel of an interstate "open economy" and one whose use would be expected to foreclose rather than make possible the exercise of state authority. Nevertheless, the court below embraced the argument of California and held that the use of the channels and instrumentalities of interstate commerce in itself and without more was sufficient to justify plenary state regulation of the users of those channels and instrumentalities. Such a decision is obviously worthy of full review by this Court.

I

In *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533, decided in 1944, this Court for the first time held that the business of insurance constituted interstate commerce. In response to this decision, Congress in 1945 passed the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. The legislative history of the Act shows specifically that Congress intended that the authority granted to the states to regulate interstate commerce was not to exceed the bounds fixed by the then existing decisions of the Supreme Court limiting the reach of state power over out-of-

state insurers.[12] This Court in *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, confirmed and followed Congress' intent and both the California Supreme Court and appellee in this case have acknowledged that California's authority to regulate the interstate transactions of appellants is to be measured by the case law of this Court as it stood in 1945.[13]

The course of decisions at the time of the passage of the McCarran-Ferguson Act establishes a readily discernible standard. Under that standard an unlicensed out-of-state insurer covering risks within a state by mail but maintaining no agents or other representatives or property or place of business within the state's boundaries is not subject to the state's regulatory and taxing jurisdiction. This rule was expressly recognized by the principal advocate of a federal bill introduced in 1943 to extend state jurisdiction over mail order insurers, who stated: "State legislatures

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[12] The House Report stated: "Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State *or to regulate such transactions in any way.*" H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (Emphasis added).

[13] See Appendix A, p. 12a, *infra;* Appellant's Opening Brief in California District Court of Appeal, p. 10 (on file with Record in this Court).

have no jurisdiction whatever unless there is an agent of a company within the States."[14] Indeed, this standard continues to have vitality in determining the limitations on state power to regulate a company by reason of its interstate mail order transactions as is shown by the opinion of this Court in *National Bellas Hess* v. *Dept. of Revenue,* 386 U.S. 753. There the Court in denying the power of the state over interstate mail order transactions referred to "the sharp distinction" which the decisions "have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." 386 U.S. at 758.

In *State Bd. of Ins.* v. *Todd Shipyards Corp.,* 370 U.S. 451, 458, this Court, referring to the three decisions cited in the legislative history of the McCarran-Ferguson Act—*Allgeyer* v. *Louisiana,* 165 U.S. 578, *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U.S. 346, and *Connecticut Gen. Ins. Co.* v. *Johnson,* 303 U.S. 77—said that Congress had "tailored the new regulations for the insurance business with specific reference to our prior decisions" and that "these earlier decisions are part of the arch on which the new structure rests . . . ."

In *Allgeyer* the Court held invalid a Louisiana statute that made it unlawful for any person to do any act in the state to obtain for himself or another insurance on property within the state from any marine insurance company which had not complied in all

[14] Hearings on H.R. 687 Before the House Committee on the Post Office and Post Roads, 78th Cong., 1st Sess. 9 (Rep. Hobbs). See pp. 28-29, *infra.*

respects with the laws of the state. In *St. Louis Cotton Compress Co.* and *Connecticut General,* the Court held that states could not constitutionally tax the premiums paid to out-of-state insurance companies on policies made outside the state covering risks located within the state.

A common characteristic of the facts in all three cases was that the insurance contracts sought to be regulated or taxed were not solicited, made or administered through the use of agents, other representatives, or offices within the boundaries of the state.[18] This is equally true in the present case. Not one of the appellants has agents or other representatives or any offices or property within California and each conducts its transactions with the insured entirely by mail. The contracts of insurance, with the exception of one of the types issued by United, are not concluded within California. Unless the standard of *Allgeyer* and its successors, held by this Court in *Todd* to have been written into the McCarran-Ferguson Act, is rejected its seems evident that the California statute cannot be enforced against appellants.

To avoid the thrust of these decisions, the appellee and the California Supreme Court have relied upon two other pre-1945 decisions of this Court, *Osborn* v. *Ozlin,* 310 U.S. 53, and *Hoopeston Canning Co.* v. *Cullen,* 318 U.S. 313, which upheld state regulation in the particular situations there involved. These two

[18] In *Allgeyer* and *St. Louis Cotton Compress Co.* the insurance company was not licensed in the state and had no agents or place of business within its boundaries. In *Connecticut General,* which involved reinsurance contracts covering risks within the state, the contracts were not made or administered through agents or offices within the state even though the insurer was licensed to do business in the state.

cases are alleged to take a "new" approach to the jurisdictional problem. This attempted distinction of the *Allgeyer* line fails for several reasons.

First, *Osborn* and *Hoopeston* had nothing at all to do with insurance effected entirely by mail. In each instance state ordinances were upheld as applied to foreign insurers who were licensed by the regulating state and who made use of agents within the state. No contact of that kind is relied on here to sustain California's regulatory jurisdiction.[16]

Second, it is apparent that Congress did not regard the decisions in *Osborn* and *Hoopeston* as relaxing the limitations on state authority laid down in *Allgeyer* and its successors. The Committee Report did not even cite *Osborn* and *Hoopeston*. In *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, this Court held that it is the understanding and intention of Congress that is to be followed. In *Todd* the state argued, as California has argued in this case, that *Osborn* and *Hoopeston* had relaxed the limitations on state authority laid down in *Allgeyer* and its successors. This Court held that it was unnecessary to decide this question, 370 U.S. at 453, because in the McCarran-Ferguson Act Congress had "indicated without ambiguity" that "state 'regulation or taxation' should be kept

[16] The only one of the pre-1945 cases in which the Court took note of the role of interstate correspondence was *Allgeyer* itself. In that case insurance coverage existed by virtue of a master policy contracted outside the state in which the property was located, the property involved being successive shipments of goods. To effect insurance upon each individual shipment the insured had to send successive letters from the state to the insurer's headquarters, whereupon a new policy would be issued covering the risk. Despite this continuing and essential correspondence the Court invalidated the state statute governing the insurance. The solicitation letters and subsequent correspondence in the present case are no more integral to the insurance transactions here.

within the limits set by the *Allgeyer, St. Louis Cotton Compress* and *Connecticut General Life Insurance* decisions," 370 U.S. at 456.

Third, the legislative history of the McCarran-Ferguson Act makes it clear that Congress intended not simply to forbid the states to transgress limitations theretofore affirmatively set out in the decisions of this Court but to prevent them from exercising "any power to regulate or tax the business of insurance beyond that which they *had been held to possess* prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.*" H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (emphasis added). Whatever may be said of *Hoopeston* or *Osborn,* it is perfectly clear that they did not hold that a state could regulate and tax an insurance company whose only solicitation of and contracting with its citizens was done by mail. It is equally clear that there is no case prior to passage of the McCarran-Ferguson Act in which any state "had been held to possess" such authority. It follows that the principle applied by this Court in *Todd* requires the conclusion that California cannot validly exercise any such authority here.

There is additional evidence that the law as it existed in 1945 did not sanction the exercise of regulatory authority that California is now attempting. At that time the decisions of this Court did not even sanction service on an out-of-state insurance corporation that was not licensed to do business in the state and that had no agents or any property or offices within the state. See *Minnesota Commercial Men's Ass'n* v. *Benn,* 261 U.S. 140. In dismissing this fact as irrelevant, the California court erroneously relied upon *International Shoe Co.* v. *Washington,* 326 U.S. 310, and *Travelers*

Health Ass'n v. *Virginia*, 339 U.S. 643; not only were both cases decided after the passage of the McCarran-Ferguson Act but in both cases the company regularly utilized for the purposes of solicitation representatives or agents or *de facto* agents within the state. Even as late as 1950 the law with respect to substituted service of process was accurately summarized in the concurring opinion in *Travelers Health Ass'n*:

> "A state is helpless when the out-of-state company operates beyond the borders, establishes no office in the state, and has no agents, salesmen, or solicitors to obtain business for it within the state. Then it is beyond the reach of process." 339 U.S. at 653-54.

The fact that at the time of passage of the McCarran-Ferguson Act substituted service was not constitutionally permissible in such a case is a powerful demonstration that the state also lacked power to tax or to regulate. For in view of the different interests involved constitutional limits on state power to tax and to regulate are more stringent than those governing state authority to affect substituted service of process. See *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, 653 (concurring opinion).[17]

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[17] In view of this established difference in the standards governing substituted service of process, on the one hand, and regulation or taxation, on the other, even were it assumed contrary to fact that *Benn* had been impaired or overturned by 1945, it would not follow that state power to tax or regulate had been similarly expanded. For the same reason, it is irrelevant that present case law would allow substituted service on an out-of-state insurer without agents, representatives, property or offices in the state. McGee v. International Life Ins. Co., 355 U.S. 220. *McGee* would have no bearing in any event because it represents the law as it had developed more than a decade after the McCarran-Ferguson

The California court's opinion places heavy reliance on *Ministers Life & Cas. Union* v. *Haase,* 385 U.S. 205. We submit that that reliance is plainly misplaced, and that *Ministers* is in fact entirely consistent with the distinction discussed above between cases where representatives are present within the state and those where they are not. To be sure that case, in dismissing without opinion an appeal from a state court, sustained Wisconsin's regulatory and tax statute as applied to an out-of-state insurance company soliciting by mail in Wisconsin. The insurer did, however, make extensive use of representatives in Wisconsin in marketing the policies. Both for its group accident and health insurance and for its group life insurance sales, the insurer utilized a "group leader" for each master policy to negotiate the policy. For group life, as the Wisconsin court pointed out, the group leader further "undertakes to enroll the individual members of the group" and "collects and remits the premiums." 30 Wis. 2d at 348, 141 N.W.2d at 290. For group accident and health, the basic tasks of the group leader were "to initiate the original application and the initial premium and to get the group started." *Id.*

Ministers is entirely consistent with the numerous decisions of the Court, both before and after passage of the McCarran-Ferguson Act, holding that personal solicitation by persons within a state to effect or promote sales is a critical element in the linkage allowing the state to regulate or tax the selling company. *FTC*

Act, a development unhampered by the statute because service of process does not constitute regulation or taxation which alone are limited by the statute.

Appellants recognize that under the rule of the *McGee* case they are amenable to service of process in California litigation arising out of their insurance transactions with citizens of the state.

v. *National Cas. Co.*, 357 U.S. 560; *Scripto* v. *Carson*, 362 U.S. 207; *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313; *International Shoe Co.* v. *Washington*, 326 U.S. 310. That those assisting in the sale of policies in *Ministers* had a relationship with the insurer different from that of the conventional life insurance agent does not remove the case from the rule of the cited cases for, in the words of the *Scripto* case, "True, the 'salesmen' are not regular employees of [the selling company] devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance." 362 U.S. at 211.[18] In short, far from supporting the California Supreme Court the result in *Ministers* is aligned with appellants' basic position that the decisive element, present in that case and absent in this one, is the maintenance of representatives within the jurisdiction seeking to regulate or to tax.

The decision of this Court in *National Bellas Hess* v. *Dept. of Revenue*, 386 U.S. 753, last Term is far more in point than *Ministers*. In that case, decided subsequent to the California court's decision here, Illinois sought to regulate an out-of-state mail order house by requiring it to collect a use tax levied by the state upon purchases by its residents. The company regularly solicited orders by mailing catalogues and flyers into the state and filled orders by mail or common carrier, and in the fifteen-month period for which taxes had

[18] The California Supreme Court discounted the importance of the "group leaders" because it said that the briefs submitted to this Court in *Ministers* did not label them as "agents," Appendix A, p. 19a, *infra*, but the label applied to them is irrelevant since their existence and functions were prominent in the lower court decisions and their legal significance well established. See, *e.g.*, Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (Court's opinion), 653-54 (concurring opinion).

been assessed had made sales of almost $2.2 million, but it maintained no facilities, agents or other representatives in Illinois.

This Court held the Illinois statute unconstitutional, and in so doing stated that it would not depart from "the sharp distinction" which its decisions have drawn between mail order sellers with retail outlets, solicitors or property within a state, and those who merely communicate with customers in the state by mail or common carrier as part of a general interstate business. 386 U.S. at 758.

We submit that *National Bellas Hess* is controlling.[19] Its authority is in no way impaired by the fact that the case involved an industry not subject to the McCarran-Ferguson Act, and this is true even if that Act is read as permanently removing all Commerce Clause impediments to the exercise of state authority over insurance. For it is indisputable, given the legislative history as interpreted in *Todd,* that the statute did not remove Due Process limitations but on the contrary embodied them as they existed in 1945. Since in the present context Due Process and Commerce Clause limitations are coextensive, as *National Bellas Hess* unequivocally states, 386 U.S. at 756, it follows that

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[19] The Illinois court had upheld the exercise of state power on the same ground on which the California court rested its decision here, *i.e.*, that there was "continuous solicitation" within the state through the use of the interstate mails even though there were no agents, representatives or offices within the state. 34 Ill. 2d at 172, 214 N.E. 2d at 759. This Court's decision in *National Bellas Hess* rejected this reasoning and held that interstate mail transactions with the citizens of a state even though continuous and substantial do not, standing alone, constitute the kind of state "interest" or "contact" that will justify state regulation or taxation of interstate mail order operations.

the Due Process Clause quite as much as the Commerce Clause forbids state regulation or taxation if the foreign company has no agents, representatives, property or offices within the state and transacts its business solely by mail.[20]

Indeed, the McCarran-Ferguson Act, far from detracting from the significance of *National Bellas Hess,* makes it an *a fortiori* precedent. For, as we have earlier demonstrated and the appellee has conceded, whatever authority California may today have over other industries, the McCarran-Ferguson Act restricts its authority to regulate out-of-state insurers to the limits imposed by federal constitutional principles as they existed in 1945, unaffected by any relaxation in those principles that may have occurred since that time.

II

The importance of the present case and the need for its plenary consideration by this Court are further borne out by a consideration of the consequences that must flow from the California decision. The superimposition of the California statute and comparable statutes of other states on existing domiciliary state and federal regulation would undercut the essential concept of mail order insurance. The operative premise of the sale of insurance by mail is uniformity in

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[20] *National Bellas Hess* cannot be distinguished on any theory that it involved taxation and that the present case involves regulation. There is no basis for suggesting that regulation is permissible where taxation is forbidden. See Travelers Health Ass'n v. Virginia, 339 U.S. 643, 650 (concurring opinion). Compare Allgeyer v. Louisiana, 165 U.S. 578 (regulation), with St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (taxation).

policy forms and promotional and advertising material and centralization of solicitation and administration. That this method of providing insurance serves an important economic function is demonstrated by the growth of the mail order insurance companies and by the variety of classes of the population whose needs they serve.[21] If the mail order insurance companies are now to be subject to regulation and taxation by every state with whose inhabitants they deal through the mails there is grave doubt whether the mail order method of providing insurance can survive. This is demonstrable by reference to certain of the particular consequences that will follow from state regulation and taxation of those companies.

(a) The laws of a substantial number of states make it unlawful for unlicensed insurance companies to execute or renew any contract of insurance covering subject matter located in the state except through a resident agent or after approval in writing by such an agent and provide that the agent must countersign all policies and renewals.[22] The practical effect of these

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[21] Hearings on H.R. 687 Before the House Committee on the Post Office and Post Roads, 78th Cong., 1st Sess.

[22] California has such a requirement, Cal. Ins. Code, 801-02, which would apply to a number of mail order insurance companies, although life and health and accident insurance are excluded from its reach. Under the laws of other states, *e.g.*, N.Y. Ins. Law § 130, the requirement would apply to appellants themselves on a large part of their health and accident business.

The laws of some states go so far as to require a licensed foreign insurance company to pay commissions to resident agents on all contracts of insurance covering risks within the state even though the contract is made outside the state. See Kline, Regulation of Mail Order Accident and Health Insurance 207 (N.Y.S. Ins. Dept.).

provisions will be to require mail order insurance companies either to add the cost of compensating resident agents to their present cost of soliciting and administering their policies by mail or, in order to compete on equal terms with companies which operate through agents alone and so do not incur the expenses of mail solicitation, to curtail drastically or even to abandon their traditional method of doing business.[23]

(b) The burdens involved in being licensed by every state in which insurance is sold by mail will bear with particular severity upon the smaller mail order insurance companies which have for years acted in reliance upon the McCarran-Ferguson Act and the limitations on state power embodied in that statute. Under the insurance statutes of many states, including those of California, the licensing authority is authorized to apply standards for admission that often permit judgments that are highly subjective in character.[24] It is not unusual for the processing of a license application to take several years.[25] If the decision below is sus-

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[23] See Kline, Regulation of Mail Order Accident and Health Insurance 77 (N.Y.S. Ins. Dept.): "For example, countersignature requirements are common throughout the United States and companies now operating without agents would be required under some of the present laws to change to an agency system of operation." See also Hearings on H.R. 687 Before the House Committee on the Post Office and Post Roads, 78th Cong., 1st Sess. 21, 29.

[24] See, *e.g.*, Cal. Ins. Code § 717.

[25] "The admission and licensing of foreign insurers has not been conducted in as efficient and direct manner as the public interest dictates. In several States, the pending licensing applications which have not been acted upon are quite substantial, indicating a restraint on possible legitimate competition within that State and perhaps undue favoritism to the domestic companies." S. Rep. No. 1834, 86th Cong., 2d Sess. 243.

tained a mail order insurance company must forebear from all interstate mail solicitation of citizens of the state until this application process is successfully completed. A small company faced with this kind of a period of limbo in any substantial number of states may well find it difficult to continue operations.

Once the license is obtained it initiates a continuing and onerous relationship with the state. Policy forms must be filed with and approved by the appropriate state authority and even after initial approval that authority retains the right to require changes in format or terms or even to withdraw approval altogether.[26] Fees must be paid; reports must be filed and corporate books remain open for examination.[27] Even though a small mail order insurance company is financially sound its business in any one state may not be sufficiently great to make it feasible for it to assume these burdens.[28]

(c) The insurance laws of the several states contain detailed and voluminous provisions governing the form, content, terms and operation of insurance policies.[29] These requirements of state law are not uniform

[26] See, *e.g.*, Cal. Ins. Code §§ 10205, 10270.93, 10290.

[27] Cal. Ins. Code, §§ 705, 731, 900.

[28] "A small company is prohibited from being licensed in all the States because the annual fees and other expenses are so high in relation to the premiums received that a small company would be forced to withdraw and discontinue business in such States, which object the large insurance companies are endeavoring to obtain." Testimony of the National Mutual Church Insurance Company, Hearings on H.R. 687 Before the House Committee on the Post Office and Post Roads, 78th Cong., 1st Sess. See also Kline, Regulation of Mail Order Accident and Health Insurance 77 (N.Y.S. Ins. Dept.).

[29] In the case of California, see Cal. Ins. Code §§ 381, 386, 430, 483, 551-52, 10113, 10160, 10206-10, 10350.

with the result that policy forms, terms, conditions or practices that satisfy the law of one state may be in conflict with the laws of other states.[30] And even when a state statutory provision is uniform in its terms with the statutes of other states the regulatory officer or agency often interprets the provision in a way that is in conflict with the interpretation of the same provision adopted by the regulatory authorities of other states. The states have adopted a so-called "State Fair Trade Practices Act" which provides for regulation of advertising and other solicitation material. Because of the generality of the terms used in the statute, the state authorities have adopted varying interpretations in applying the statute to particular pieces of advertising. In this respect state regulation of advertising practices stands in contrast to the uniform and consistent regulation of the Federal Trade Commission. See pp. 27-28, *infra*.

The efficiencies and economies that inhere in the appellants' present use of uniform policy forms, uniform methods of administration, and uniform advertising and solicitation material are made possible in large measure by the fact that they are subject to a uniform and consistent regulatory system. It is these economies and efficiencies that have made it possible for the mail order insurance companies to provide insurance policies that meet the special needs of par-

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[30] For example, it is common for the state law to provide in the case of certain kinds of insurance that the amount of the premium must be fixed in relation to the percentage of gross premiums received that is paid out in satisfaction of claims. The percentage prescribed for this purpose varies from state to state.

ticular classes of customers and to provide for certain classes of the population modest insurance policies on which the premiums are not sufficiently substantial to attract the effort of companies which operate only through agents.

(d) Under the decision of the court below California—and any other state—would have the authority to levy premium taxes upon mail order companies. In fact the decision would appear to create the possibility that the State could, as a condition to granting a license, require appellants to pay premium taxes and penalties for prior years in which appellants have sold insurance by mail in California. These taxes would impose an additional serious burden on the mail order insurance companies—a burden that could not be justified on the ground of state protection or services since the companies maintain no agents, representatives, offices or property within the State. See *National Bellas Hess* v. *Dept. of Revenue,* 386 U.S. 753.[21]

It must be emphasized that these burdens and conflicts must be conceived not merely as a single set of California obligations paralleling those of the appellants' domicile but potentially a concurrent obligation of comparable weight in every state outside its own domicile with which an appellant has the slightest mail

[21] The amount of the premium taxes on direct mail companies would be far in excess of any amount that could be justified on the ground that the taxes were necessary to pay the costs of regulation. A Senate subcommittee in the course of its investigation found that less than 5% of the revenue from premium taxes is devoted to insurance regulatory activity, the balance of the revenue going into the general funds. S. Rep. 1834, 86th Cong., 2d Sess. 243.

contacts.[32] There can be little question that if California's right to regulate is upheld a proliferation of state regulation will ensue. Highly pertinent is the comment of the Court in *National Bellas Hess* that, were the Illinois statute there at issue upheld, "the resulting impediments upon the free conduct of [the company's] interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State . . . ." 386 U.S. at 759.

The adverse impact of state regulation should not be regarded as confined merely to the private interests of the mail order insurance companies. The impact on the companies will in turn have an effect upon wider interests that deserve consideration. The mail order insurance companies are engaged in providing insurance that satisfies a defined and important economic need, a need that without their particular mode of operation might well remain unfilled. Because the mail order companies often specialize in particular types of risks, see pp. 5-6, *supra*, they can tailor their policies to the given need and, through their mailings, bring this insurance to the attention of persons who might otherwise be unaware of its existence. Operation by mail from a centralized point also makes it feasible to promote insurance useful to the public but not worth the effort of local-agent companies, as for example,

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[32] The insurance codes of a substantial number of states contain so-called "retaliatory" provisions. Under those provisions a foreign insurer is required to comply with any obligations or restrictions imposed by the state of its domicile upon foreign insurers that are heavier or more stringent than those contained in the code. Section 685 of the California Insurance Code contains such a provision.

low cost-limited coverage policies for particular classes or groups.

The opportunity to do insurance business by mail provides access to the industry on a broad geographic scale for small companies which although financially sound lack the large initial investment required to qualify and to establish agents in every state in which they have an opportunity to sell insurance. It is an established pattern for mail order insurance companies that begin by selling limited kinds of insurance to a limited clientele, sometimes in a limited geographic area, to grow and to extend their operations to other kinds of insurance, to larger classes of the population, and to wider areas. The California decision, by heightening the barriers to entry into the insurance industry, moves in exactly the wrong direction.

The lower court's decision is wholly unnecessary to protect the public interest in light of the regime of federal law that currently governs the sale of insurance by mail. The McCarran-Ferguson Act provided that after 1948 the federal antitrust laws and the Federal Trade Commission Act should "be applicable to the business of insurance to the extent that such business is not regulated by State law." Section 2(b), 15 U.S.C. § 1012(b). Under this mandate the Federal Trade Commission, following a study of existing state regulation and after conferences with the industry, promulgated in 1950 rules regulating the advertising and sales activities of mail order insurers. These rules embrace deception, adequate disclosure in the description of policy coverage and benefits, permissible use of terms, testimonials, analyses, and statistics in advertisements, misrepresentation as to licensing approval

or endorsements, and a range of similar topics. 15 Fed. Reg. 599. These rules were revised several times and now constitute the Commission's "Guides for the Mail Order Insurance Industry." 16 C.F.R. § 14.11. Under these rules the Commission from time to time goes so far as to review the claim files of companies under its jurisdiction to make certain that the companies administer claims in a manner consistent with their advertising.

The appellants do not oppose such federal action but indeed accept it as a uniform system of regulation that protects the public interest and at the same time promotes efficient interstate operations. This Court has liberally construed Congress' grant of authority to the Commission under the McCarran-Ferguson Act. *FTC* v. *Travelers Health Ass'n,* 362 U.S. 293. But if California is allowed to extend its own regulatory scheme to appellants' operations, then federal authority over those operations will *pro tanto* automatically lapse, a conclusion evident from the statutory language quoted above and confirmed by this Court's decision in *FTC* v. *National Cas. Co.,* 357 U.S. 560.

Congress has on a number of occasions as far back as 1935 and as recently as 1959 had before it legislation that would effectively extend state jurisdiction over insurance by mail to the degree now sought by California,[33] and hearings have been held on such legislation several times. See *e.g.,* p. 5, n. 6, *supra.* Congress has never adopted any of these proposals,

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[33] See H.R. 6542 and 8206, 74th Cong., 1st Sess.; H.R. 687, 78th Cong., 1st Sess.; H.R. 2393 and 6916 and S. 981, 84th Cong., 1st Sess.; H.R. 116, 5041 and 7087, 85th Cong., 1st Sess.; H.R. 9052, 86th Cong., 1st Sess.

which strongly suggests that it is satisfied with an allocation of control between state and federal governments that does not permit state regulation or taxation of the interstate mail order insurance business. This is a final reason why California's departure from the established understanding of the McCarran-Ferguson Act and the associated constitutional standards warrants plenary review by this Court.[34]

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted,

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September 1967

[34] This Court has previously recognized the importance of the McCarran-Ferguson Act and granted review of cases affecting its interpretation. State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451; FTC v. Travelers Health Ass'n, 362 U.S. 293; FTC v. National Cas. Co., 357 U.S. 560.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

L.A. [illegible]

THE PEOPLE, *Plaintiff and Respondent*,

v.

CENTRAL NATIONAL LIFE INSURANCE COMPANY,
Defendant and Respondent.

L.A. [illegible]

THE PEOPLE, *Plaintiff and Appellant*,

v.

FIDELITY LIFE INSURANCE COMPANY,
Defendant and Respondent.

L.A. [illegible]

THE PEOPLE, *Plaintiff and Appellant*,

v.

NATIONAL LIBERTY LIFE INSURANCE COMPANY,
Defendant and Respondent.

We hold in these consolidated cases that California may constitutionally regulate insurance transactions of foreign [illegible] companies which [illegible] in this state unless such regulation [illegible] California [illegible] productivity in such [illegible] [illegible] Additionally, we conclude that [illegible] insurers engaged in [illegible] [illegible] [illegible] [illegible] [illegible]

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

L.A. 28843

THE PEOPLE, *Plaintiff and Appellant,*

v.

UNITED NATIONAL LIFE INSURANCE COMPANY,
Defendant and Respondent.

L.A. 28844

THE PEOPLE, *Plaintiff and Appellant,*

v.

PIONEER LIFE INSURANCE COMPANY,
Defendant and Respondent.

L.A. 28845

THE PEOPLE, *Plaintiff and Appellant,*

v.

NATIONAL LIBERTY LIFE INSURANCE COMPANY,
Defendant and Respondent.

We hold in these consolidated cases that California can constitutionally regulate insurance transactions of foreign insurance companies which, although they have no agents in this state, solicit and negotiate such transactions with California residents exclusively by mail from offices outside this state. Additionally we conclude that foreign insurers engaging in such activities are subject to the provisions of section 700 of the Insurance Code[1] and, as

[1] Hereafter, unless otherwise indicated, all section references are to the Insurance Code.

a condition precedent to engaging therein, must procure from the Insurance Commissioner of this state (commissioner) a certificate of authority in accordance with that section. As we explain, *infra,* we find that such regulation comports with applicable criteria of federal due process and is free of conflict with any federal law or regulation. We also point out that the conclusions which we reach do not affect the validity or enforceability of pertinent insurance policies heretofore contracted by defendants. We therefore reverse the judgments.

The facts are not in dispute. Defendants United National Life Insurance Company (United), Pioneer Life Insurance Company (Pioneer) and National Liberty Life Insurance Company (National) were organized under the laws of other states[2] and have offices only in the respective states of their incorporation. Each defendant is licensed by its home state to carry on the particular class of insurance business in which it is engaged. Generally speaking all three companies solicit insurance business exclusively by mail.

In the Pioneer and National cases the defendants solicit residents of California by mailing to the latter individually from their home offices (see fn. 2, *ante*) application forms and other material. These documents explain the particular policy being offered, set forth the premiums, emphasize the low cost of the coverage, and urge the California addressee to complete and return the application form, together with payment of the first premium, to the company at its home office. The policy is thereafter issued at the home office and mailed to the applicant. Payments of subsequent premiums are received from the California policyholder by mail.

In the case of United there is a difference in the method of operation. As part of its solicitation by mail, United

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[2] United was incorporated in Arizona; Pioneer in Illinois; and National in Pennsylvania.

issues a pre-indorsed policy and sends it to California residents who are parents of recently inducted members of the armed services, together with an "ownership application" and other material explaining the policy. The recipient is urged to complete and return the application, together with payment of the designated first premium. Unlike the policies of Pioneer and National which, as we have said, are issued by the company at its home office only after it has received the completed application and first premium, United's policy is effective immediately upon deposit by the policyholder of the completed application and required premium in the United States mail in California.

None of the three companies has offices or agents in California; has any other representative within this state; or has at any time applied to the commissioner for, or received from him, a certificate of authority as provided in section 700.[3]

These actions were brought by the commissioner in the name of the People pursuant to section 12928.6[4] to enjoin defendant companies "from engaging directly or indirectly, by mail or otherwise" in the insurance business in California or "from transacting insurance in California as defined in section 35" unless and until a certificate of au-

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[3] See fn. 11, *infra*.

[4] Section 12928.6 provides: "Whenever the commissioner believes, from evidence satisfactory to him, that any person is violating or about to violate any provisions of this code or any order or requirement of the commissioner issued or promulgated pursuant to authority expressly granted the commissioner by any provision of this code or by law, the commissioner may bring an action in the name of the people of the State of California in the superior court of the State of California against such person to enjoin such person from continuing such violation or engaging therein or doing any act in furtherance thereof. In such action an order or judgment may be entered awarding such preliminary or final injunction as is proper."

thority is obtained in compliance with section 700. In their respective answers, defendants in the main admitted their methods of solicitation by mail as alleged by the commissioner in his complaints and as described above, but denied that they had violated or would in the future violate any of the provisions of the California Insurance Code. The answers also set forth a number of affirmative defenses, which, it is sufficient to say at this point, asserted the lack of power or jurisdiction of the court to grant the relief prayed for by the commissioner and additionally the inapplicability of sections 35 and 700 to the particular insurance business being conducted by them. In each of the actions motions for summary judgment were filed by the plaintiff and by the respective defendant company. In each the court granted the defendant's motion and denied plaintiff's motion upon the ground that California could not constitutionally regulate the type of insurance business being conducted.[5] Judgments were entered accordingly. These appeals by the People followed.

Simply stated the issues before us are these: (1) Whether California can constitutionally regulate the transaction of the mail order insurance business; and (2) whether section 700 is applicable to such business.

We consider the first issue in an historical setting. In 1869 the United States Supreme Court held that policies of insurance "are not articles of commerce in any proper meaning of the word . . . [and] are not inter-state transactions, though the parties may be domiciled in different States." (Paul v. Virginia (1869) 75 U.S. (8 Wall.) 168, 183; 19 L.Ed. 357, 361.) *Paul* and many cases following it upheld state regulation of the insurance business on the premise that it was not interstate commerce and there-

[5] The memorandum of decision states in pertinent part: "Constitutionally, the State of California is without power to regulate this type of mail-order insurance business, where defendant has no offices, employees, or agents in California, and deals with California residents only through the mail from its offices" in another state.

fore not subject to federal regulation under the commerce clause. In 1944 in United States v. South-Eastern Underwriters Association, 322 U.S. 533, 88 L.Ed. 1440, in what it later described as "a reorientation of attitudes toward federal power in its relation to the business of insurance conducted across state lines" (Prudential Ins. Co. v. Benjamin (1946) 328 U.S. 408, 414), the Supreme Court held that such business *was* interstate commerce and consequently subject to federal regulation. As the parties herein point out to us, in the interval between *Paul* and *South-Eastern Underwriters* state regulation of the insurance business proliferated without restrictions other than those predicated upon the due process clause of the federal Constitution. Comprehensive state systems of regulation and taxation were predicated "on the rationalization that insurance was not commerce, yet was business affected with a vast public interest . . . [and] the negative implications of the commerce clause became irrelevant, . . ." (Prudential Ins. Co. v. Benjamin, *supra*, 328 U.S. 408, 415-416.)

To meet the threat to state regulation presented by the holding in *South-Eastern Underwriters* and to preserve state regulation from attacks based on the commerce clause, Congress in 1945 promptly passed the McCarran Act (15 U.S.C.A. §§ 1011-1015). This act expressly provided that the regulation and taxation of the business of insurance should be subject to the laws of the several states.[6] The Supreme Court in Prudential Ins. Co. v.

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[6] 15 U.S.C.A. section 1012, so far as is here pertinent provides:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: . . ."

Benjamin, *supra*, 328 U.S. 408, rejected a broad and vigorous attack on the act and dispelled any doubt as to the efficacy of the McCarran Act to free state regulation from possible commerce clause restraint. As the court there said: "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. [Fn. omitted.] The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects." (Pp. 429-430.)

As the parties before us recognize, the McCarran Act, while validating state power to regulate and tax in respect to the commerce clause, did not purport to circumscribe such power in the light of the due process clause. It remained for the court's decision in State Board of Insurance v. Todd Shipyards (1962) 370 U.S. 451, to construe and assess the act as against due process requirements. *Todd* which we discuss in more detail, *infra*, affirmed a Texas decision declaring unconstitutional a statute imposing a tax on premiums paid to an insurer not licensed to do business in that state. The court in *Todd* held that state regulation should be examined in the light of due process criteria existing prior to the enactment of the McCarran Act and "should be kept within the limits set by" Allgeyer v. Louisiana (1897) 165 U.S. 578, St. Louis Cotton Compress Co. v. Arkansas (1922) 260 U.S. 346, and Connecticut General Life Insurance Co. v. Johnson (1938) 303 U.S. 77. (State Board of Insurance v. Todd Shipyards, *supra*, 370 U.S. at p. 456.)

Quoting from the House report and the Senate debate on the act,[7] the court said: "We need not decide *de novo* whether the results (and the reasons given) in the *Allgeyer, St. Louis Cotton Compress,* and *Connecticut General Life Insurance* decisions are sound and acceptable. For we have in the history of the McCarran-Ferguson Act an explicit, unequivocal statement that the Act was so designed as not to displace those three decisions." (370 U.S. at p. 455.)

"The power of Congress to grant protection to interstate commerce against state regulation or taxation [citations] or to withhold it [citations] is so complete [fn. omitted] that its ideas of policy should prevail.

"Congress, of course, does not have the final say as to what constitutes due process under the Fourteenth Amendment. . . . But the policy announced by Congress in the

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[7] The court quoted from the House report as follows: "'It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.* Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.' H. R. Rep. No. 143, 79th Cong., 1st Sess., p. 3." (370 U.S. 455-456.)

The court also quoted the following statement made by Senator McCarran during the Senate debate after reading the above excerpt from the House report: "'. . . we give to the States no more powers than those they previously had, and we take none from them.'" (P. 456.)

McCarran-Ferguson Act was one on which the industry had reason to rely since 1897, when the *Allgeyer* decision was announced; . . . When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions [citation], we should be loath to change them." (Pp. 456-457.)

"Here Congress tailored the new regulations for the insurance business with specific reference to our prior decisions. Since these earlier decisions are part of the arch on which the new structure rests, we refrain from disturbing them lest we change the design that Congress fashioned." (P. 458.)

The several parties to the present controversy appear to agree that the first issue before us must be determined according to principles of due process found in the pre-McCarran Act decisions. They are in dispute, however, as to the precise meaning and extent of these principles. We face the usual alignment and distinguishing of precedents on all sides. It is necessary that we first briefly examine the trilogy of Supreme Court decisions cited above.

In *Allgeyer*, the court struck down as violative of the due process clause a Louisiana statute imposing a fine on any person insuring, or doing any act to effect insurance on, property in the state with an insurance company that had not complied with Louisiana law. Defendants, exporters and residents of Louisiana, entered into an open contract of marine insurance in New York with an insurer that was organized in and doing business in the State of New York. The insurance covered bales of cotton shipped from New Orleans to foreign ports. The insurer had no agents in Louisana and engaged in no activities of any kind within that state. The only act done in Louisiana was the mailing by the insured to the insurance company of a communication requesting coverage as to a particular shipment of goods. Premiums and losses under

the contract were payable in New York. It was held that Louisiana could not regulate such a contract where it "was made beyond the territory of the State of Louisiana, and the only thing that the facts show was done within that State was the mailing of a letter of notification . . . which was done after the principal contract had been made." (165 U.S. at p. 587.)

In *St. Louis Cotton Compress,* a statute of Arkansas imposed a tax of five percent on gross premiums paid to companies not authorized to do business in that state, which was three percent more than the tax imposed on authorized companies. The cotton compress company, a Missouri corporation authorized to do business in Arkansas, contracted and paid for a policy of fire insurance in Missouri covering its property in Arkansas. Holding the statute, as applied to the particular facts, violative of due process, the court said: "This case is stronger than that of *Allgeyer* in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside." (260 U.S. at p. 349.)

In *Connecticut General,* the court also declared void under the due process clause a California statute imposing an annual tax on gross premiums as applied to certain contracts of reinsurance entered into by appellant, a Connecticut corporation licensed to do business in California, with other insurance companies also licensed to do business in this state. However, the reinsurance contracts were entered into in Connecticut where the premiums were paid and where any losses were payable. The court observed that "California had no relationship . . . to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any

privilege or authority granted by it, and California laws afforded to them no protection." (303 U.S. at p. 81.)

At this point we turn to examine two other Supreme Court cases decided before the passage of the McCarran Act but after the trilogy of cases just discussed: Osborn v. Ozlin (1940) 310 U.S. 53 and Hoopeston Canning Co. v. Cullen (1943) 318 U.S. 313, relied upon heavily by plaintiff but rejected with equal fervor by defendants.

In *Osborn* the court sustained the validity of a Virginia statute forbidding insurance companies authorized to do business in that state to make contracts of insurance or surety except through registered resident agents of such companies. Rejecting the claims of foreign insurers licensed in Virginia that the statute deprived them of rights protected by the Fourteenth Amendment, the court said: "Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it." (310 U.S. at pp. 62-63.) The court distinguished *Allgeyer* stating that although some doubts had been cast upon that case (see also Note (1962) 76 Harv. L.Rev. 152, 153), the statute in *Allgeyer* "was thought to be directed not at the regulation of insurance within the state, but at the making of contracts without." (P. 67.)

In *Hoopeston,* the issue was whether reciprocal fire insurance associations whose attorneys-in-fact were located in Illinois could constitutionally be made subject to New York laws as a condition of insuring property in that state. Under the pertinent facts a canner or wholesale grocer in New York would sign an application to become a subscriber and send it to the attorney-in-fact in Illinois. If

the risk were accepted the applicant would sign and send to the attorney-in-fact a power of attorney and an application. The policy was then issued by the attorney-in-fact and mailed to the subscriber in New York. On occasions insurance engineers were sent to New York to investigate the risk or the loss. The contracts reserved the right of the reciprocals to go into New York to repair or replace lost or damaged property.

It was urged that the statute as applied to the reciprocals was unconstitutional since the contracts of insurance were signed in Illinois and losses were paid by checks mailed from that state. Rejecting this contention, the court said that "the issue remains whether the insurance enterprise as a whole so affects New York interests as to give New York the power it claims.

"In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. [Fn. citing *Allgeyer*.] More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss. . . .

"The actual physical signing of contracts may be only one element in a broad range of business activities. . . ." (318 U.S. at pp. 316-317.)

Distinguishing *Allgeyer*,[8] the court concluded that "in determining whether insurance business is done within

[8] *Allgeyer* was distinguished as inapplicable to situations where the business of insurance sought to be regulated had many actual contacts with the regulating state. The comment has been made that *Hoopeston* thus limited *Allgeyer* to its facts. (See Note (1963) 61 Mich. L. Rev. 1171, 1173.)

a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, *Osborn* v. *Ozlin, supra,* of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight." (P. 319.)

Finally we return to State Board of Insurance v. Todd Shipyards, *supra,* 370 U.S. 451. In *Todd,* as we have said, the court passed upon the constitutionality of a Texas statute imposing a five percent premium tax on policies purchased from an insurer not licensed in Texas covering risks in that state. The insurers were not licensed to do business in Texas, had no offices or agents there and neither solicited business nor investigated risks or claims in that state. The insured was a New York corporation doing business in Texas; the insured property was located there. All insurance transactions, including the negotiation and payment of the insurance, the issuance of the policies and the adjustment and payment of losses—took place outside Texas. In affirming the Texas decision holding the statute unconstitutional the court observed that unlike *Osborn* and *Hoopeston* the insurance companies carried on no activities in Texas and that the "only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas." (370 U.S. at p. 455.)

If, therefore, as seems required, we examine the pre-McCarran decisions for guidelines of due process in this type of case, we discern two separate yet consistent trends of decision. The first, exemplified by the earlier trilogy of cases (*Allgeyer, St. Louis Cotton* and *Connecticut General*) emphasized the place of making the contract sought to be taxed or regulated and, having found all activities relevant to the making and carrying out of the contract to have occurred outside the regulating state, invalidated all

efforts of the latter to control them. The second, exemplified by the later cases of *Osborn* and *Hoopeston*, laid emphasis on the contacts with the regulating state arising from the transactions involved and the interest of the state in such transactions consequent upon such relationship. Indeed, as we have already pointed out, the court itself in *Hoopeston* recognized such distinct philosophies expounding in the first instance a "conceptualistic discussion of theories of the place of contracting or of performance" and in the second the state's "substantial interests in the business of insurance of its people or property *regardless of these isolated factors.*" (Emphasis added.) (318 U.S. at p. 316.) We say that these trends of decision are consistent because upon analysis the first category of cases actually represents situations where there were no contacts sufficient to support the jurisdiction of the regulating state.

We have therefore concluded that within the framework of the McCarran Act and in accordance with principles of due process prior thereto, interstate insurance transactions may properly be regulated when they have sufficient contacts with the regulating state so as to give the latter a substantial interest in the transactions. Such regulation, though predicated on a variety of factual circumstances, will be upheld if kept within the limits of *Allgeyer, St. Louis Cotton* and *Connecticut General* which define only the outer boundaries of due process. This trilogy of cases merely tells us that where there are no activities within the regulating state (Allgeyer v. Louisiana, *supra,* 165 U.S. 578; cf. State Board of Insurance v. Todd Shipyards, *supra,* 370 U.S. 451) regulation will not meet due process tests. We therefore reject the thesis of defendants herein that the issue now before us must turn on the presence of agents in the regulating state: that where agents are present, regulation is permissible but where, as in the instant cases, agents are not present, regulation cannot

be upheld even though other contacts between the insurer and the insured have been established through the mails.

Our foregoing conclusion finds cogent support in Ministers Life and Casualty Union v. Haase (1966) 141 N.W. 2d 287, appeal dismissed 385 U.S. 205. There the plaintiff insurance company, a Minnesota corporation not licensed to do business in Wisconsin attacked a comprehensive regulating and taxing law of the latter state upon the ground *inter alia* that it was violative of due process. There, as in the instant case, the insurer had no office, officer, bank account or real estate in the regulating state. It solicited business through advertisement in national and other publications and by direct mail. In the case of individual policies, upon receiving an inquiry the insurer would mail an application to the prospect who would complete and return it to the Minnesota home office. The policy would then be mailed to the applicant who would become a member of Ministers upon delivery and acceptance. All premium notices were mailed from the home office and all premiums were payable and received there.

In the case of group insurance, the group-prospect in Wisconsin would select a group leader who would negotiate with the insurer for the policy and would receive the literature and necessary forms. The group leader enrolled the members, received the master policy and premium notices for the group, and collected and remitted the premiums, individual members received a certificate of insurance. In respect to some group insurance, each member received from the insurer by mail individual policies and premium notices. Group leaders were not compensated and did not handle claims.

After reviewing the McCarran Act and the pertinent decisions on due process announced prior thereto, the Wisconsin Supreme Court sustained the statute in question, observing: "We think *Osborn* and *Hoopeston* are sufficient authority for Wisconsin's jurisdiction to regulate

the type of insurance business presented by the instant facts and represent the prevailing view of the jurisdiction to tax and regulate an insurance business within the limits of due process." (141 N.W. 2d at p. 294.) Regulation was posited on the interest which Wisconsin had in the transactions because of the contacts with that state. Said the court: "Here, we have a systematic solicitation of insurance by mail, not sporadic but continuous, and in addition, group leader's solicitations.[9] ... . Ministers has 'realistically entered the state looking for and obtaining business.' ... In common parlance and in any enlightened sense, it cannot be said that Ministers does not do business in Wisconsin." (P. 295.)

Ministers' appeal to the United States Supreme Court was dismissed by that court for want of a substantial federal question. (Ministers Life & Casualty Union v. Haase (1966) 385 U.S. 205.) At oral argument before us counsel for defendants conceded that such dismissal was a determination of that case on the merits and had res judicata effect. (Ohio ex rel. Eaton v. Price (1958) 360 U.S. 246, 247; Two Guys from Harrison-Allentown, Inc. v. McGinley (D. Pa. 1959) 179 F. Supp. 944, 949; see (1949) 62 Harv. L. Rev. 488, 489, 494.) They recognized at the same time that the case acquired some precedential value although they urged that it was exceedingly limited. We decline to give *Ministers* such grudging acceptance. In our view, it is persuasive authority in the resolution of the issue before us.

Nor are we impelled to abandon or modify our conclusions as to the applicable criteria of due process in these cases because of the decision in Minnesota Commercial Men's Assoc. v. Benn (1923) 261 U.S. 140, cited

[9] The court continued: "We need not consider group leaders as agents but even Ministers should admit they are significant contacts which were encouraged to work for Ministers' benefit and which were relied upon as a method of doing business." (P. 295.)

to us by defendants and heavily relied upon by them as an authority "of particular significance." There the court declared void for want of jurisdiction a Montana judgment obtained upon substituted service on the Secretary of State and Insurance Commissioner of Montana against a Minnesota insurance company engaged in the mail order insurance business with offices only in its home state. The Supreme Court held that the Minnesota insurer was not doing business in Montana and could not be deemed to be "present" there because local members solicited new prospects.

Defendants herein argue that *Benn* is applicable to the cases at bench "a fortiori" for two reasons: (a) Since *Benn* denied *service of process* jurisdiction over a foreign direct mail insurer, it constitutes even more persuasive authority against jurisdiction to *regulate* where more substantial contacts with the regulating state are required (citing Jeter v. Austin Trailer Equipment Co. (1953) 122 Cal. App. 2d 376, 381); and (b) since *Benn* involved solicitation by mail and also solicitation by members within the state and since these two forms of solicitation failed to support even *service of process* jurisdiction, solicitation by mail alone, as in the instant cases, cannot possibly suffice to confer jurisdiction *to regulate*.

Unfortunately for defendants both "a fortiori" arguments depend upon the continued validity and acceptance of the holding in *Benn* and must succumb to the same fate which *Benn* has met in later decisions. A complete answer to any claim for the validity of *Benn* is found in the following language of the Wisconsin Supreme Court in *Ministers*: "*Benn's* 'presence concept' of doing business may be conceded to no longer have vitality in the field of jurisdiction for service of process in view of International Shoe Co. v. State of Washington (1945), 326 U.S. 310, 66 S.Ct.

154, 98 L.Ed. 95, whose minimum-contact theory of jurisdiction was proclaimed only a few years after the decision in *Osborn* and *Hoopeston* in the related field of states' jurisdiction to tax and regulate. In fact, Travelers Health Association v. Commonwealth of Virginia (1950), 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154, in reference to an argument that *Benn* was controlling, said, quoting *Hoopeston*, '[W]e rejected the contention, based on the *Benn* case among others, that a state's power to regulate must be determined by a "conceptualistic discussion of theories of the place of contracting or of performance." Instead we accorded "great weight" to the "consequences" of the contractual obligations in the state where the insured resided and the "degree of interest" that state had in seeing that those obligations were faithfully carried out.'" (141 N.W. 2d at p. 294.)

Applying due process criteria which give recognition to the substantial interest of the regulating state in the insurance transactions involved, we are satisfied that in the circumstances of the instant cases there are sufficient contacts with California to justify regulation. The insureds are, of course, residents of California. The solicitation of insurance actually takes place in California where the advertising material and other forms are received by the individual addressees. Thus realistically viewed the insurer through the instrumentality of the mail is for all practical purposes soliciting insurance here as manifestly as if it were to carry on such solicitation through representatives physically present within this state. (See Golden & Co. v. Justice Court (1914) 23 Cal. App. 778, 793-794; People v. Fairfax Family Fund, Inc. (1964) 235 Cal. App. 2d 881, 885). In response to this solicitation, California residents complete and sign in this state the applications for insurance. Indeed, defendant United sends to the California addressee a pre-indorsed policy which becomes effective

in this state, when the policyholder deposits in the mail here the completed "ownership application" for return to United's home office.[10] In all instances payment of premiums is made by California residents from funds or bank accounts located in California. It is clear that any claims made under the policies will most likely be investigated in this state and that any litigation in connection with the policies will undoubtedly be commenced in California courts. It is also foreseeable that should defendants for any reason fail to perform their obligations in accordance with the policies, California might be called upon to provide assistance for the persons within its borders who were intended to be financially assisted by the benefits under the policies.

In short, these defendants have " 'realistically entered the state looking for and obtaining business' " (Ministers Life and Casualty Union v. Haase, *supra,* 141 N.W. 2d at p. 295); the main aspects of their insurance transactions are in this state; and to say that they are not doing business here "is to completely ignore the facts of life and reality." (People v. Fairfax Family Fund, Inc., *supra,* 235 Cal. App. 2d 881, 885.) We think the substantial interest of California in these transactions is obvious.

The cases before us are easily distinguishable from *Allgeyer, St. Louis Cotton* and *Connecticut General* where nothing was done by the insurance companies within the regulating states. None of these cases reached the question, here crucial, of solicitation by mail sent into the regulating state. Contrary to defendants' claims, our conclu-

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[10] Without derogating from the People's cases against Pioneer and National, this circumstance constitutes an additional contact in the case against United. We are not persuaded by the claim of United's counsel at oral argument that this is a factor without significance in the United case.

sions in these cases are not in conflict with *Todd*. As we have explained, in that case as in *Allgeyer* all of the insurance transactions took place outside the regulating state (Texas), the only contact between Texas and the transactions being the insured property located in Texas. *Todd*, like *Allgeyer*, involved no solicitation by mail and while the insured property appears to be a contact, it is not within our province to question the Supreme Court's evaluation of this contact as supportive of a substantial state interest. As we have said, the facts of the instant cases approximate those in *Ministers* and while *Ministers*, unlike the present cases, involved group leaders, this circumstance at best furnished merely an additional contact in that case. (See fn. 9, *ante*.) At oral argument before us, defendants contended that such group leaders were in effect agents of the insurer in the regulating state and argued that the dismissal of the appeal by the United States Supreme Court was on such basis. The instant parties have made available to us copies of the briefs and other pertinent records filed in the United States Supreme Court in connection with the motion to dismiss. Our examination of these has failed to disclose that the motion to dismiss in *Ministers* was argued on the issue that the group leaders were the insurer's agents.

Having concluded that California may constitutionally regulate these transactions, we turn to consider whether they fall within the regulatory reach of section 700.[11] As

[11] Section 700 provides in relevant part: "A person shall not transact any class of insurance business in this State without first being admitted for such class. Such admission is secured by procuring a certificate of authority from the commissioner. Such certificate shall not be granted until the applicant conforms to the requirements of this code and of the laws of this State prerequisite to its issue. After such issue the holder shall continue to comply with the requirements as to its business set forth in this code and in the laws of this State. . . ."

appears below, under this statute a person shall not *transact* any class of insurance business *in this state* without first obtaining a certificate of authority from the commissioner. Section 35 provides: "'Transact' as applied to insurance, includes any of the following: (a) Solicitation. (b) Negotiations preliminary to execution. (c) Execution of a contract of insurance. (d) Transaction of matters subsequent to execution of the contract and arising out of it."

As we have already explained, we think it is clear that defendants' solicitation of insurance takes place in California where their advertising and other materials are received through the instrumentality of the mails. (See Golden & Co. v. Justice Court, *supra,* 23 Cal. App. 778, 793-794.) At the same time, the receipt of such material in this state constitutes "'Negotiations preliminary to execution'" of the contracts of insurance. It seems to us an ineluctable conclusion that through such "solicitation" and such "negotiations preliminary to execution" defendants "transact . . . insurance business in this State." (§§ 35, 700.)

Defendants contend that section 700 was never intended to apply to insurance transactions negotiated by mail across state lines. However the statute is cast in broad language and in our view indicates a legislative intent to exercise a plenary power of regulation over insurance transactions in this state, howsoever effectuated. It is settled that "the business of insurance is affected with a public interest" (Carpenter v. Pacific Mut. Life Ins. Co. (1937) 10 Cal. 2d 307, 329) and that there is a duty upon the Insurance Commissioner of this state "to protect the rights of all insurance policyholders." (Caminetti v. State Mut. Life Ins. Co. (1942) 52 Cal. App. 2d 321, 324.) Like its predecessor statute (Pol. Code, § 596) on which it is based, section 700 is "applicable to insurance companies

of all types, domestic as well as foreign." (Connecticut Gen. Life Ins. Co. v. Johnson (1935) 3 Cal. 2d 83, 89.) In respect to insurance companies organized in other states which transact business here, the requirements of section 700 are "designed to secure an examination by the Insurance Commissioner to determine, among other things, the solvency of such organizations." (Samson v. State of California (1942) 55 Cal. App. 2d 194, 196.) In the face of what we think is its clear objective, namely to protect the people of California and "to provide for the welfare of the people, in affording security to them in such insurance as they may choose to effect upon their property, and to protect them against fraudulent schemes of insurance, or deception by plausible inducements which may be held out for their patronage" (State I. & I. Co. v. San Francisco (1894) 101 Cal. 135, 145), to posit, as defendants urge, a restricted field of regulation for the statute would be to impair its efficacy and thwart its objective. Support for our conclusion is found "in the rule that a statute must be construed with reference to the object to be accomplished. . . ." (In re Petraeus (1939) 12 Cal. 2d 579, 583 and cases there collected; see also Golden & Co. v. Justice Court, *supra,* 23 Cal. App. 778, 794.) We are guided by the fundamental rule "what the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation." (Rock Creek etc. Dist. v. County of Calaveras (1946) 29 Cal. 2d 7, 9; Freedland v. Greco (1955) 45 Cal. 2d 462, 467.)

Defendants urge however that "long continued administrative construction" impels our conclusion that section 700 is inapplicable. They invoke the rule that "'[T]he contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such interpretation unless it is clearly

erroneous or unauthorized.' [Citations.]'' (Richfield Oil Corp. v. Crawford (1952) 39 Cal. 2d 729, 736.)

In support of their position defendants direct our attention to a letter emanating in 1961 from the Compliance and Legal Division of the Department of Insurance stating in substance that California did not and could not constitutionally regulate the transaction of insurance by mail.[12]

In reply, the Attorney General directs our attention to an opinion of his predecessor (Ops. Cal. Atty. Gen. No. 6386) rendered in 1928 at the request of the commissioner which interpreted Political Code section 596 (the predecessor statute of § 700) as being applicable to insurance business solicited by mail addressed to California residents from outside this state. Defendants on the other hand argue that for almost thirty years neither the Department of Insurance nor the Attorney General attempted to regulate transactions such as those now presented or to apply section 700 to them.

Assuming these conditions existed, nevertheless, while recognizing the weight to which they may be entitled, we are not persuaded that they should prevail over the clear broad reach of the statute as construed in the light of its objectives. It is manifest that in 1928 the Attorney General *was* of the opinion that the statute applied and so advised the then commissioner. If, despite this opinion, the department's subsequent policy was as reflected in its 1961 letter referred to above, we think its continued forbearance of little value as an aid to construction, since

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[12] The letter dated April 19, 1961, by J. N. Andrews, Assistant Chief of said division and addressed to a person in the State of Pennsylvania states: ''The laws of this State do not and it is our understanding that they could not constitutionally regulate the transaction of insurance through the United States mails.''

such inaction appears to have been the result of a misapprehension as to the constitutionally permissible limits of state regulation. (See fn. 12, *ante*.) As we have shown, transactions such as the instant ones *may* be constitutionally regulated by California. Therefore "an erroneous administrative construction does not govern the interpretation of a statute." (Estate of Madison (1945) 26 Cal. 2d 453, 463.) "Mere failure to act, however, does not constitute an administrative construction" (Estate of Madison, *supra*) and the failure in the past of any of the officers of this state charged with the responsibility of enforcing section 700 to apply it to transactions like the present ones will not estop the People from doing so at some time thereafter. (Caminetti v. State Mut. Life Ins. Co., *supra*, 52 Cal. App. 2d 321, 326.)

Defendants also contend that since "every statute should be construed with reference to the whole system of law of which it is a part" (Stafford v. Realty Bond Service Corp. (1952) 39 Cal. 2d 797, 805), an examination of related statutes shows that the Legislature did not intend section 700 to regulate the business carried on by them. They direct our attention to the Unauthorized Insurers Process Act (§§ 1610-1620, added by Stats. 1949, ch. 495) and to the Unauthorized Insurers False Advertising Process Act (§§ 1620.1-1620.7, added by Stats. 1961, ch. 297). The point of defendants' argument is that if section 700 already applied to mail order insurance these two acts would have been "entirely surplusage."

We find no merit in the point. Both acts are service of process statutes. Sections 1610-1620 provide that specified acts "by mail or otherwise, by a foreign or alien insurer" not admitted to do business in this state shall constitute an appointment by such insurer of the Insurance Commissioner as attorney for the service of process. As the act

expressly declares,[18] its purpose was to provide, in addition to existing methods (§ 1615), a special method of substituted service of process in the light of the McCarran Act.

Defendants advance a further argument grounded on section 1616 which prohibits the filing of any pleading by any nonadmitted foreign or alien insurer unless it either (1) procures a certificate of authority *or* (2) deposits cash or securities or files a bond to secure payment of any final judgment. Defendants' point here is that since the foreign insurer has the option of either alternative it can in fact appear in the litigation without procuring a certificate of authority at all and that therefore we must conclude that section 700, which requires such certificate, was not intended to be applicable. We do not agree. In our view, section 1616 merely offers the above alternatives to all such

[18] Section 1 of the act (Stats. 1949, ch. 495, § 1) states: "The purpose of this act is to subject certain insurers to the jurisdiction of courts of this State in suits by or on behalf of insured or beneficiaries under insurance contracts. The Legislature declares that it is a subject of concern that non-admitted insurers have issued policies of insurance to residents of this State physically present herein at the time of such issuance, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies; that this State has an interest in providing to its residents a convenient forum for the purpose of asserting and enforcing legal rights under such policies; that if such residents are left to seek remedy in distant forums they will be, for practical purposes, without remedy. In furtherance of such state interest, the Legislature herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this State, and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 20, First Session, S. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states."

insurers, not only those who complied with section 700 by obtaining a certificate, but also to those who failed to comply with that section.

The second group of sections (§§ 1620.1-1620.7) referred to by defendants appears to have been enacted with the same general purpose[14] and can be explained in the same way. Like the sections first considered, these provide for an additional method of substituted service of process. However, defendants make much of the fact that their purpose is also "to subject to the jurisdiction of the commissioner" (see fn. 14, *ante*) nonadmitted foreign insurers which place or send into California any false advertising. As the Attorney General points out to us, these statutes manifest the purpose of exercising the power conferred on the states by the McCarran Act (15 U.S.C.A. § 1012, subd. (a)) which we have heretofore discussed. The McCarran Act also provided that the Federal Trade Commission

[14] In this instance we find in section 1620.1 a declaration of purpose substantially the same as that set forth for sections 1610-1620. Subdivision (a) of section 1620.1 provides: "The purpose of this article is to subject to the jurisdiction of the commissioner and to the jurisdiction of the courts of this State, insurers not authorized to transact business in this State which place in or send into this State any false advertising designed to induce residents of this State to purchase insurance from insurers not authorized to transact business in this State. The Legislature declares it is in the interest of the citizens of this State who purchase insurance from insurers which solicit insurance business in this State in the manner set forth in the preceding sentence that such insurers be subject to the provisions of this article. In furtherance of such state interest, the Legislature in this article provides a method of substituted service of process upon such insurers and declares that in so doing, it exercises its power to protect its residents and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 20, 1st Session, S. 340, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states; the authority provided in such sections to be in addition to any existing powers of this State."

should have the power to regulate false and deceptive insurance advertising across state lines "to the extent that such business is not regulated by State law." (15 U.S.C.A. § 1012, subd. (b).) Subsequent decisions raised some question as to the efficacy of state regulation absent a specific statement therein of an intention to regulate false and deceptive advertising. (Federal Trade Com. v. National Cas. Co. (1958) 357 U.S. 560; Federal Trade Com. v. Travelers Health Assn. (1960) 362 U.S. 293.) It appears to us that the sections under examination were enacted so as to make clear that California was exercising the specific regulatory power envisioned by the McCarran Act. Furthermore, we note that section 1620.1 states that "the authority provided in such sections to be in addition to any existing powers of this State." We fail to discern in either of the above two arguments any inconsistency with section 700 which derogates from the broad scope of that statute.

For the foregoing reasons we have concluded that section 700 applies to the transactions involved in the cases before us. Our previous discussion herein of the McCarran Act and the events leading up to its enactment should set at rest any question of conflict between section 700 and any federal statute.

Finally defendants express some concern as to the impact of our conclusions on their present California policyholders. The interests of those who currently hold policies contracted for with heretofore unauthorized insurance companies were considered in reaching this decision, and we have concluded that they will not be adversely affected. Some few jurisdictions hold such policies to be unenforceable by insured persons (e.g., Jackson v. Mutual Fire Ins. Ass'n (1922) 154 Ark. 342, 242 S. W. 567; United American Ins. Co. v. Union Fire Ins. Co. (1927) 82 Colo. 72, 257 Pac. 246). A similar rule once existed in California by force of a statute declaring such policies "null and void"

(Pol. Code, § 596), but the Legislature repealed that provision in 1917 (Stats. 1917, ch. 106, p. 150).[15] The majority of jurisdictions hold that such policies may be enforced by the insured. (E.g., Pennypacker v. Capital Ins. Co. (1890) 80 Iowa 56, 45 N.W. 408; Walters v. Western Automobile Ins. Co. (1924) 116 Kan. 404, 226 Pac. 746; Winston-Norris Co. v. King (1926) 119 Okla. 109, 249 Pac. 319; Roane v. Union Pac. Life Ins. Co. (1913) 67 Ore. 264, 135 Pac. 892; United Services Automobile Ass'n v. Zeller (Tex. 1939) 135 S.W. 2d 161.)

The insurance industry is regulated primarily for the benefit of those who make use of the services the industry offers. Penalties are imposed on those members of the industry who violate the regulatory scheme (e.g., §§ 761, 779.22, 782, 790.07), but the Insurance Code places no penalties, or even duties, on insured persons. In fact, no practical method exists for a member of the protected class of insureds to ascertain whether his insurer has complied with the applicable regulations. We reject imposition of the minority rule that would allow an insurer who has issued policies and collected premiums in violation of the law to avoid obligations to the detriment of innocent members of the protected class. (McConnell v. Underwriters at Lloyds (1961) 56 Cal. 2d 637, 643-644; cf. Goldstone v. Columbia Life & Trust Co. (1917) 33 Cal. App. 119, 121-122.)

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[15] Political Code section 596, the predecessor to section 700, contained the following provision until 1917: "All policies and other contracts of insurance, issued without full compliance by all parties concerned with the laws of this state, shall be null and void." In 1917 that language was repealed and was replaced with: "Nothing in this section shall be construed to deprive any citizen of this state of the right to negotiate and effect insurance on his own property." (Stats. 1917, ch. 106, p. 150.) Upon the enactment of the Insurance Code in 1935 section 700 incorporated much of the substance of Political Code section 596. However, it contained no reference to the validity of an "illegal" policy.

The judgments are reversed and the causes are remanded to the trial court for further proceedings in conformity with the views herein expressed.

SULLIVAN, J.

We Concur:

TRAYNOR, C.J.
McCOMB, J.
PETERS, J.
TOBRINER, J.
BURKE, J.

APPENDIX B

Opinion of the District Court of Appeal

In the District Court of Appeal of the State of California, Second Appellate District, Division Four.

The People, Plaintiff and Appellant, vs. United National Life Insurance Company, Defendant and Respondent. 2nd Civil No. 30330.

The People, Plaintiff and Appellant, vs. Pioneer Life Insurance Company, Defendant and Respondent. 2nd Civil No. 30331.

The People, Plaintiff and Appellant, vs. National Liberty Life Insurance Company, Defendant and Respondent. 2nd Civil No. 30332.

FILED: September 14, 1966.

APPEALS from judgments of the Superior Court, Los Angeles County, Carlos M. Teran, Judge. Reversed and remanded.

Judgments denying injunctions to require compliance with section 700 of the Insurance Code, reversed and remanded.

Thomas C. Lynch, Attorney General, and H. Warren Siegel, Deputy Attorney General, for Plaintiff and Appellant.

O'Melveny & Myers, Warren M. Christopher, William W. Vaughn, and Girard E. Boudreau, Jr., for Defendant and Respondent National Liberty Life Insurance Company.

Beardsley, Hufstedler & Kemble, Seth M. Hufstedler and John Sobieski, for Defendants and Respondents United National Life Insurance Company and Pioneer Life Insurance Company.

This is an appeal from three judgments of the superior court, in favor of the above three defendants, denying California the right to license and regulate defendants' activities in carrying on, from another state, mail order insurance business with residents of California. Acting pursuant to the authority conferred by section 12928.6 of the Insurance Code, the Insurance Commissioner, sued, in the name of the People of California, to enjoin defendants from carrying on their business, as hereinafter described, unless and until they had procured a certificate of authority as provided for by section 700 of the Insurance Code.[1] Defendants answered, admitting the facts as alleged by the complaint but denying the legal conclusions thereof and setting forth five affirmative defenses. They also filed interrogatories, seeking answers as to the administrative interpretation of section 700 and administrative practice thereunder. Both plaintiff and the several defendants moved for summary judgment. The trial court entered summary judgment for defendants, on the ground that California could not constitutionally regulate the activities involved. For that reason, it regarded any issues as to the

[1] Since defendants had no agents in California, service was made on the Secretary of State. No objection to the mode of service was made and it is not contended that defendants were not subject to suit in California.

administrative interpretation of section 700 as being immaterial and (since the interrogatories went only to that issue) they were not required to be answered.

As presented in the briefs on this appeal, the issues requiring determination are:

(1) Does the due process clause of the federal Constitution prohibit California from regulating insurance transactions of the nature carried on by defendants herein?

(2) If California may constitutionally regulate such business without violation of the due process clause, is such regulation in conflict with any federal law preempting the field of regulation?

(3) If California is not prohibited, either by the due process or the supremacy clauses, from regulation, does section 700 of the Insurance Code, properly construed, require a certificate of authority for business of the nature carried on by defendants?

I

In the case of defendants Pioneer Life Insurance Company and National Liberty Life Insurance Company, the facts material to this case are as follows: Each company is incorporated in another state and is duly licensed there to carry on the classes of insurance business in which they are engaged; they have offices in their states of incorporation, but in no other state; they solicit business from residents of California by sending to such residents large quantities of material, addressed to particular addresses. This material describes and explains the policies offered, indicates the premiums required (stressing the low cost of the policies) and urging the recipient to fill out an enclosed application form and return it, together with the indicated premium, to the home office. The policy is issued at the home office and mailed to the applicant at his California address.

The methodology of defendant United National Life Insurance Company is somewhat different. That company, also incorporated in another state, duly licensed there, and having its sole office in its state of incorporation, solicits business from California addresses by sending to the parents of persons newly inducted into the armed services a pre-endorsed policy, together with explanatory literature and material urging the parents to complete an "ownership application" and return that application, together with the prescribed premium, to the home office. The United policies, thus already in the hands of the California resident, become effective immediately upon deposit of the application and premium in the United States mail in California.

None of the companies have offices or agents in California and they have no contact with this state except as above described. None have applied for, or been issued, a certificate under section 700 of the Insurance Code.

II

In a line of decisions beginning with *Paul v. Virginia* (1869) 75 U.S. (8 Wall.) 168 [19 L.Ed. 357], it was held that insurance was not commerce. In 1944 the Supreme Court removed the insurance business from state control by declaring such business to be interstate commerce in *United States v. South-Eastern Underwriters Assn.* (1944) 322 U.S. 533 [64 S.Ct. 1162, 88 L.Ed. 1440]. Congress promptly passed the McCarran Act in 1945 (15 U.S.C., §§ 1011-15), the purpose of which was to provide for state regulation of the insurance business within limits of the due process clause. (*State Bd. of Ins. v. Todd Shipyards Corp.* (1962) 370 U.S. 451, 452 [82 S.Ct. 1380, 1381-1382, 8 L.Ed.2d 620, 622].)

It is argued, however, that the McCarran Act permitted state regulation only insofar as it did not violate due process and that the concept of "due process," for this purpose, was "frozen" in accordance with the meaning and

application of that term as defined in cases decided prior to 1945.

In a decision rendered after the case at bench was tried, the Supreme Court of Wisconsin was faced with, and decided this same contention. (*Ministers Life & Cas. Union v. Haase* (Wis. 1966) 30 Wis.2d 339, 141 N.W.2d 287). The opinion in that case analyzes and discusses the block of cases relied on by defendants for their position here, and concludes that nothing in the McCarran Act prohibits the states from regulation so long as that regulation meets the test of "due process" as now applied by the Supreme Court of the United States. We need not extend this opinion by repeating or paraphrasing here the discussion so effectively provided by the Wisconsin court. We find the reasoning of that case persuasive and its conclusion correct; we follow it here.

Applying what we understand to be the modern test—namely, that a state may regulate to protect the legitimate interests of its own citizens whenever there are sufficient contacts to cause concern—we think that there can be no question here but that the activities engaged in by defendants are a sufficient contact. The persons taking out insurance are residents of California; the applications for insurance are executed here and the premiums are paid from California funds; in the case of United the insurance contracts are completed here; in all cases, the only effective contact between the respondents and their customers is in California; to the extent that disputes arise under the insurance contracts, suits will ordinarily be brought here; if the companies are financially unsound, or if they engage in improper practices,[2] the impact falls upon California

[2] It is not contended that any of these defendants do, in fact, engage in deceptive or fraudulent advertising or that they are financially unsound. But the power to regulate does not turn on whether or not any particular licensee, in fact, currently, violates regulatory standards; the regulations are preventative in nature.

residents. Insofar as the policies solicited by mail by these defendants from California residents are concerned, California has, in fact, more interest in the solvency and integrity of the insurers than any other state. Its legitimate interest in regulation is apparent; the exercise of that power is an act well within the concept of due process.

III

It is argued that regulation of defendants by California would invade a field already pre-empted by Congress. As a general proposition, of course, this is an argument met by the very terms and purposes of the McCarran Act. However, the parties discuss whether or not section 1012 (b) of title 15 of the United States Code, one of the sections of the McCarran Act, by its terms pre-empts the regulation herein involved. But that section merely makes applicable the powers of the Federal Trade Commission over deceptive mail order advertising; it does not provide for a comprehensive regulation of, or the licensing of, the insurance business as such—that being the very matter delegated to the states by the main provisions of the Act. We are here concerned with this general power to regulate and that is all that the present suit seeks to require. Whether or not, when and if defendants have secured certificates under section 700, the commissioner is limited in his regulatory powers over their advertising by section 1012(b) is a matter which can be determined when and if it arises in a proper case.[3]

IV

Finally, it is argued that section 700, properly construed, does not apply to a foreign insurer conducting only a mail order business of the kind herein involved.

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[3] The regulation of false advertising turns not only on an interpretation of section 1012(b) of title 15, but on the constitutionality and interpretation of sections 1620.1 through 1620.7 of our Insurance Code, to which we advert at a later point in this opinion.

On its face, the statute clearly seems to be applicable. Section 700 reads as follows:

> "A person shall not transact any class of insurance business in this State without first being admitted for such class. Such admission is secured by procuring a certificate of authority from the commissioner. Such certificate shall not be granted until the applicant conforms to the requirements of this code and of the laws of this State prerequisite to its issue. After such issue the holder shall continue to comply with the requirements as to its business set forth in this code and in the laws of this State. Where a hearing is held under this section the proceedings shall be conducted in accordance with Chapter 5 of Part I of Division 3 of Title 2 of the Government Code, and the Commissioner shall have all the powers granted therein."

As defined in section 35 of the Insurance Code, "transact" includes any of the following acts:

> "(a) Solicitation.
>
> "(b) Negotiations preliminary to execution.
>
> "(c) Execution of a contract of insurance.
>
> "(d) Transaction of matters subsequent to execution of the contract and arising out of it."

Clearly, defendants "solicit" business at the time and place where their advertising material is received *(Golden & Co.* v. *Justice Court* (1914) 23 Cal.App. 778), and defendants certainly are engaged in "negotiations preliminary to execution"; they are, therefore, "transacting" insurance business in California.

Defendants argue, however, that, in the over thirty years that section 700 has been in force, it has never been applied

to mail order insurance solicitation, and that there are administrative rulings to the effect that it does not so apply. These contentions rest, in part at least, on matters which defendants sought to develop by the interrogatories which they proposed in the trial court and which, by stipulation, remain unanswered. In this state of the record, we cannot properly decide whether or not such administrative construction has existed, or whether it was of such a nature as to prevent the Insurance Commissioner, now, from applying the statute. On remand, the parties and the trial court may explore the issues raised by this contention. We point out, for their assistance, that insofar as any administrative construction rested not on an interpretation of our own statute but on a belief, based on authorities no longer controlling, that this state lacked constitutional power to regulate such businesses as those now before us, that construction is entitled to little, if any, weight.

Defendants argue, also, that the Legislature has recognized that section 700 did not apply to purely "mail order" insurance business. In support of this contention, they point to the enactment, in 1949, of sections 1610-1620 of the Insurance Code (The Unauthorized Insurers Process Act), and to the enactment, in 1961, of sections 1620.1 through 1620.7 of the same code (The Unauthorized Insurers False Advertising Process Act). We find the argument nonpersuasive. The first group of sections provide for the service of process on the Insurance Commissioner, permit the mail order insurer to appear and defend on posting a bond, and make other provisions for the conduct of suits so commenced and defended. But those sections were enacted at a time when the implications of *International Shoe Co. v. Washington* (1945) 326 U.S. 310 [66 S.Ct. 154, 90 L.Ed. 95] were just beginning to be explored and when it was still questionable whether or not the laws of this state, dealing with service of process, applied to the full extent of permissible constitutional power. The latter

point certainly was not clear before the decisions in *Henry R. Jahn & Son v. Superior Court*, 49 Cal.2d 855, decided in 1958, and *Cosper v. Smith & Wesson Arms Co.*, 53 Cal. 2d 77, decided in 1959. Under these circumstances, the enactment of sections 1620 et seq. implies no more than an intent on the part of the Legislature to make clear that, at least as to one aggravated form of the whole problem of suits against foreign corporations,[4] it wanted to go as far as it constitutionally could.[5]

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[4] Consult, for example, Horowitz, Bases of Jurisdiction of California Courts To Render Judgments Against Foreign Corporations and Non-Resident Individuals (1958) 31 So. Cal. L. Rev. 339.

[5] Sections 1610-1620 of the Insurance Code were added by chapter 495, Statutes of 1949. Section 1 of that act declares the legislative purpose as follows:

> "The purpose of this act is to subject certain insurers to the jurisdiction of courts of this State in suits by or on behalf of insured or beneficiaries under insurance contracts. The Legislature declares that it is a subject of concern that non-admitted insurers have issued policies of insurance to residents of this State physically present herein at the time of such issuance, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies; that this State has an interest in providing to its residents a convenient forum for the purpose of asserting and enforcing legal rights under such policies; that if such residents are left to seek remedy in distant forums they will be, for practical purposes, without remedy. In furtherance of such state interest, the Legislature herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this State, and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 20, First Session, S. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states."

Defendants point to the provision in section 1616, whereby a "mail order" insurer, sued under the provisions of the Unauthorized Insurers Process Act, may appear and defend, without securing a certificate from the Commissioner, but merely by posting a bond in the particular suit. They argue that the Legislature must, thereby, have indicated a belief that such an insured had lawfully sold the policy sued on without having complied with section 700. We read no such implication into the section. The fact that such policies had been and would thereafter be sold—whether legally or illegally—was a known fact. It is a practical impossibility for a foreign insurer to comply with section 700 after suit is brought and before its time to answer would expire. Assuming the (at best doubtful) power of the state to default an uncertificated insurer absolutely, that would be a most extreme device to enforce local regulation. We can read into section 1616 no more than a willingness of this state to permit a legitimate defense to individual actions even by insurers who had not met our regulatory requirements, leaving the enforcement of such requirements to other sanctions.

We find the argument based on sections 1620.1 through 1620.7 to be no more persuasive. The McCarran Act had expressly preserved the power of the Federal Trade Commission over false and deceptive advertising "to the extent that such business is not regulated by State Law." (15 U.S.C. § 1012(b).) In two cases, the United States Supreme Court had cast doubt on the effectiveness of state regulation to oust this federal power where the state law did not expressly apply to an out-of-state insurer. *(Federal Trade Com. v. Natl. Cas. Co.* (1958) 357 U.S. 560 [78 S.Ct. 1260, 2 L.Ed.2d 1540]; *Federal Trade Com. v. Travelers Health Asso.* (1960) 362 U.S. 293 [80 S.Ct. 717, 4 L.Ed.2d 724].) Again we can see no more than the expressed purpose to make crystal clear that this state

was, in fact and in law, engaged in the specific kind of regulation to which the McCarran Act referred.[6]

The judgments are reversed; the cases are remanded to the trial court for further proceedings not inconsistent with this opinion.

KINGSLEY, J.

We concur:

FILES, P. J.

JEFFERSON, J.

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[6] Section 1620.1 sets forth the Legislature's declaration of purpose as follows:

"(a) The purpose of this article is to subject to the jurisdiction of the commissioner and to the jurisdiction of the courts of this State, insurers not authorized to transact business in this State which place in or send into this State any false *advertising designed to induce* residents of this State to purchase insurance from insurers not authorized to transact business in this State. The Legislature declares it is in the interest of the citizens of this State who purchase insurance from insurers which solicit insurance business in this State in the manner set forth in the preceding sentence that such insurers be subject to the provisions of this article. In furtherance of such state interest, the Legislature in this article provides a method of substituted service of process upon such insurers and declares that in so doing, it exercises its power to protect its residents and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 20, 1st Session, S. 340, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states; the authority provided in such sections to be in addition to any existing powers of this State."

APPENDIX C*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. 865,425

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff*,

vs.

NATIONAL LIBERTY LIFE INSURANCE COMPANY,
a Pennsylvania corporation, *Defendant*.

Memorandum of Decision

By stipulation defendant's motion for summary judgment is before the Court contemporaneously with plaintiff's motion for summary judgment.

Defendant's motion for summary judgment is granted.

Plaintiff's motion for summary judgment is denied.

Constitutionally, the State of California is without power to regulate this type of mail-order insurance business, where defendant has no offices, employees, or agents in California, and deals with California residents only through the mail from its offices in Pennsylvania.

Insurance business, when conducted across state lines, is interstate commerce within the meaning of the commerce clause of the United States Constitution.

U. S. v. Southeastern Underwriters Assn., 322 U. S. 533.

While the McCarran-Ferguson Act, which was passed immediately following the decision in the *Southeastern Underwriters* case, provided that the insurance business shall be subject to the laws of the several States which relate to the regulation or taxation of such business, without restriction by reason of the commerce clause of the

* The Superior Court filed a separate opinion for each appellant but the opinions are identical save for the caption and the single reference to domicile.

United States Constitution, said Act did not purport to relieve such State regulation from the restrictions and limits of the due process clause of the Fourteenth Amendment.

McCarran-Ferguson Act of 1945, 15 USC Section 1012(a).

The United States Supreme Court has construed the due process clause of the Fourteenth Amendment, as it applies to the insurance business, in *Allgeyer* v. *Louisiana*, 165 U. S. 578, *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346, and *Connecticut General Insurance Co.* v. *Johnson*, 303 U. S. 77, which hold, *inter alia*,

> ". . . that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way."

This Constitutional interpretation was taken into account by the framers of the legislation.

HR Rep No. 143, 79th Cong, 1st Sess, p. 3.

And the United States Supreme Court has held that the *Allgeyer* line of cases is still binding with regard to the Constitutional concept of due process.

State Board of Insurance v. *Todd Shipyards Co.*, 370 U. S. 451 (1962).

Robertson v. *California*, 328 U. S. 440 (1947), and *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313 (1943), are distinguishable because they involve regulation over insurance contracts either solicited or serviced by agents present in the regulating State.

While great developments have been made in the field of due process with regard to acquiring jurisdiction to

render a judgment since *Minnesota Commercial Men's Association* v. *Benn*, 261 U. S. 140 (1923), it is important to note that the *Benn* case was the posture of the law as of the time of the enactment of the McCarran-Ferguson Act, and was therefore one of the cases on which industry had a right to rely before 1945.

If a State court had no jurisdiction to render a judgment, *a fortiori* it had no power to regulate or tax, because the requirements to regulate or tax are stricter than those to acquire jurisdiction.

Jeter v. *Austin Trailer Equipment Co.*, 122 Cal.App.2d 376 (1953).

In view of the Court's interpretation of the Constitutional issue, the issue of legislative intent will not be determined, as unnecessary to the decision.

Dated this 23rd day of December, 1965.

CARLOS M. TERAN
Judge

APPENDIX D

I. Federal Constitutional Provisions

The Commerce Clause (Art. I, § 8) provides:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Supremacy Clause (Art. VI) provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any

Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Due Process Clause (Amend. XIV, § 1) provides:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

II. Statutes

The McCarran-Ferguson Act (15 U.S.C. §§ 1011-15) provides:

"Section 1. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

"Section 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

"Section 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act,

and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof."

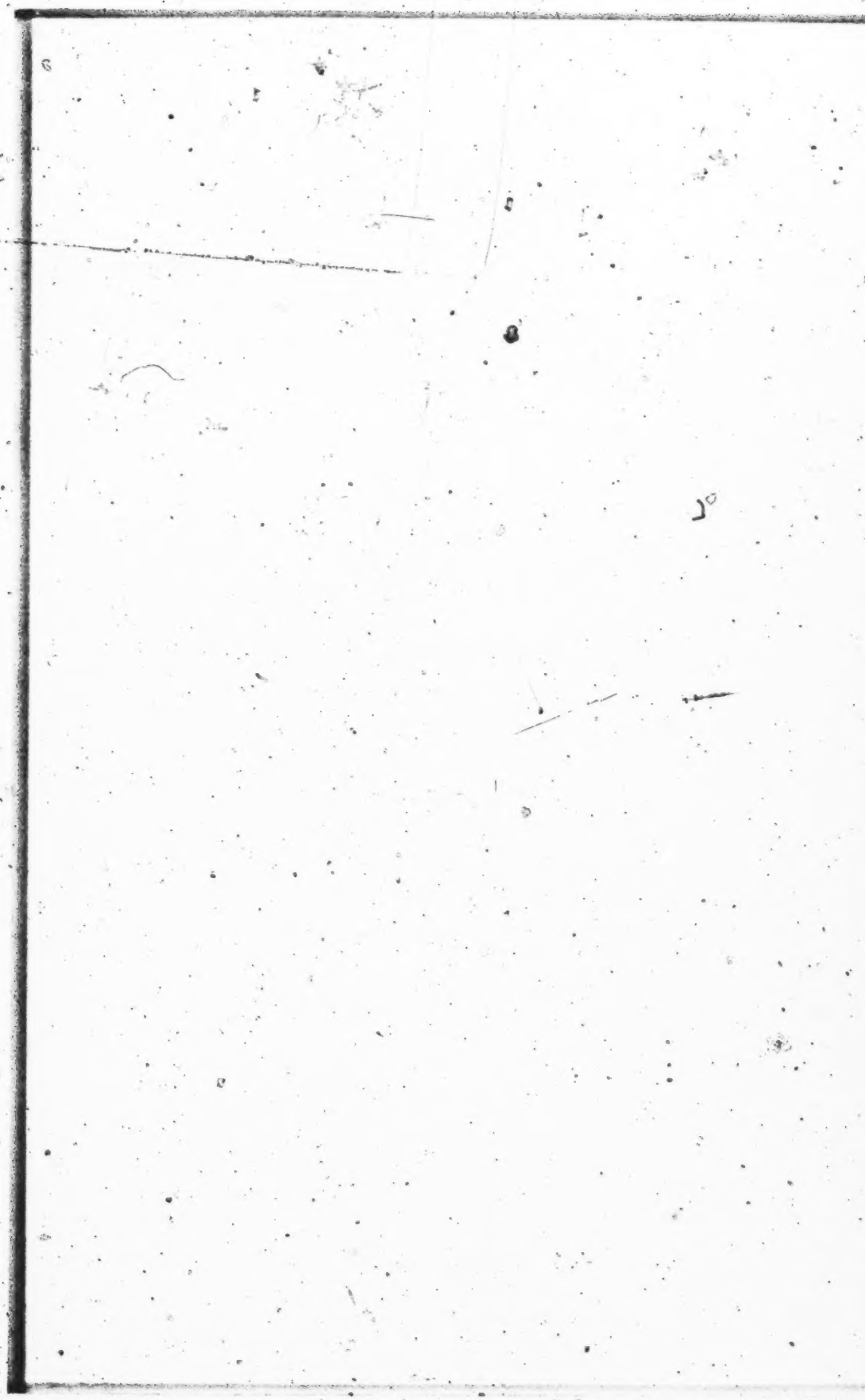
"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

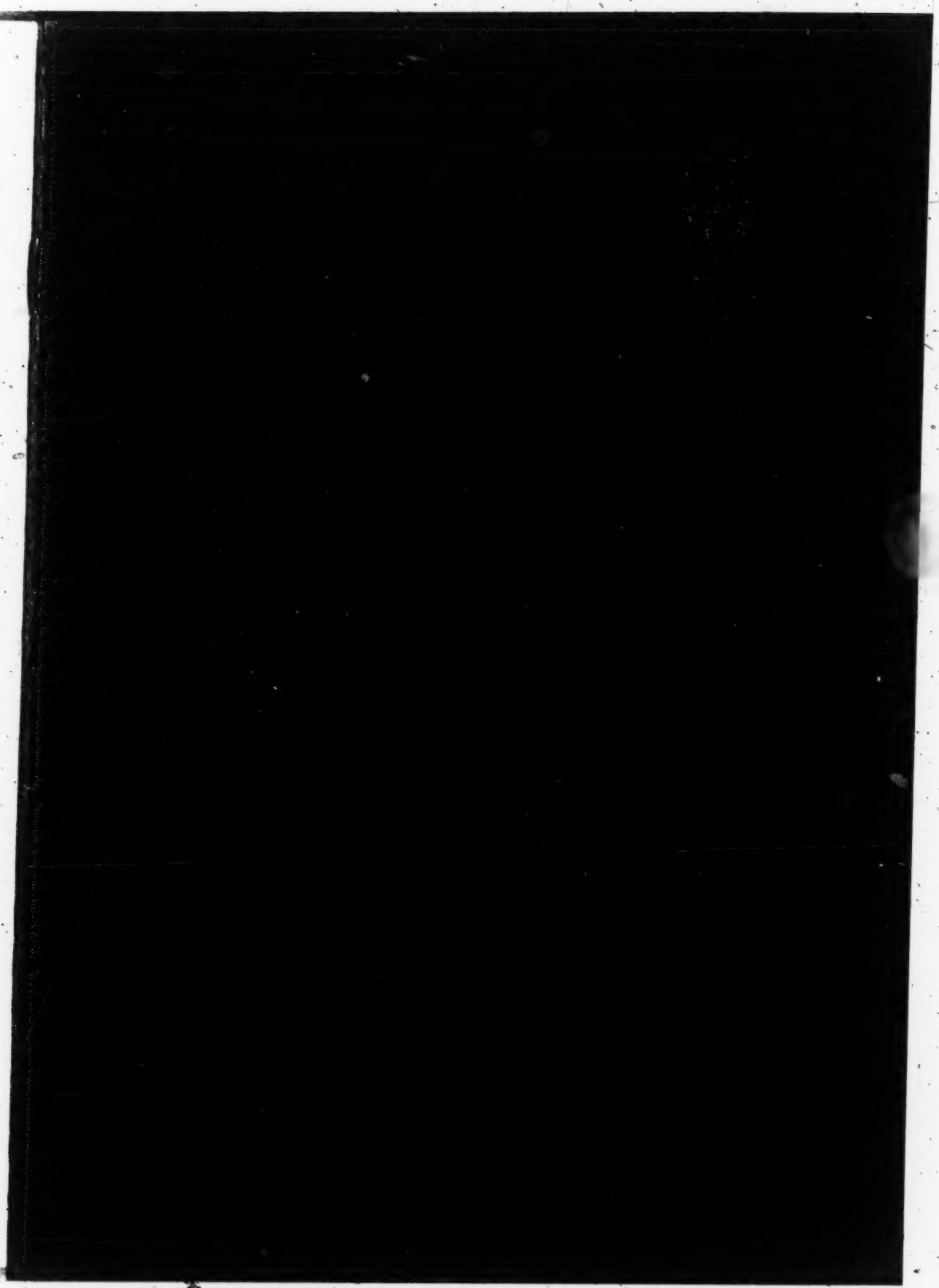
"Section 4. Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920."

"Section 5. As used in this chapter, the term 'State' includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia."

Section 700 of the California Insurance Code provides:

"Section 700. A person shall not transact any class of insurance business in this State without first being admitted for such class. Such admission is secured by procuring a certificate of authority from the commissioner. Such certificate shall not be granted until the applicant conforms to the requirements of this code and of the laws of this State prerequisite to its issue. After such issue the holder shall continue to comply with the requirements as to its business set forth in this code and in the laws of this State. Where a hearing is held under this section the proceedings shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the commissioner shall have all the powers granted therein."





IN THE

Supreme Court of the United States

OCTOBER TERM, 1967
No. 669

UNITED NATIONAL LIFE INSURANCE COMPANY, PIONEER LIFE INSURANCE COMPANY and NATIONAL LIBERTY LIFE INSURANCE COMPANY,

Appellants,

vs.

STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS.

Appellee, pursuant to Rule 16 of the Revised Rules of this Court, moves that the appeal be dimissed on the ground that the question presented is so unsubstantial as not to warrant further argument.

Question Presented.

Whether the Due Process Clause of Amendment Fourteen to the United States Constitution, or the Commerce Clause (Art. I, §8, cl. 3) of the United States Constitution, or the McCarran Act (15 U.S.C. §§1011-1015) prevents the regulation by California of insurance companies which, by mail, regularly solicit from and negotiate life insurance policies with residents of California, when this regulation is identical to the regulation of domestic insurers.

Statement.

The facts are fully and fairly presented in the opinsions below, attached as appendices A, B, and C to the Jurisdictional Statement. The opinion of the California Supreme Court (App. A to Jd. Statement) upholds the right of the State of California to regulate mail order insurers who have substantial contacts with California, including the regular and substantial solicitation of and negotiation of life insurance with California residents. On August 18, 1967, pursuant to the opinion of the California Supreme Court, identical permanent injunctions were entered against the three appellants here. This injunction is set out as Appendix I to this Motion. This injunction affects only the future acts of appellants, and specifically permits them to maintain in effect all existing policies and rights existing thereunder, and permits appellants to answer any inquiries regarding conversion rights and privileges under policies already in effect.

The application of California Insurance Code Section 700 to mail transactions extends back at least to 1928. In that year, opinion 6386 of the Attorney General, rendered at the request of the Insurance Commissioner, advised that California could license and regulate foreign insurers who solicit and negotiate insurance by mail with local residents. (Cal. Sup. Ct. Op.; Jd. Statement, pp. 22a-23a.)

In 1961 (and again in 1965), with one of the very appellants here, the Insurance Commissioner required that mail order insurance transactions be subjected to local regulation. (App. Closing Br. in Cal. Ct. App., pp. 4-5, and Exs. to said Br.) In this historical context, and construing the McCarran Act as interpreted by this Court, California's regulation of mail order insurance was upheld in the instant case.

ARGUMENT.

There Is No Substantial Federal Question.

A. The Local Regulation of Mail Order Insurance Companies Based on Substantial Solicitation and Negotiation Has Been Specifically Upheld.

With the exception of appellants' contentions based on *National Bellas Hess v. Dept. of Revenue,* 386 U.S. 753 (1967), every argument raised here was raised in the courts below, and by the parties and amicus in *Ministers Life and Casualty Union v. Haase,* 141 N.W. 2d 287 (1966), *appeal dismissed,* 385 U.S. 205 (No. 634 Oct. Term, 1966). It would be unduly repetitious to repeat appellee's position on these questions since that position is set out in the briefs below and in the amicus brief filed by appellee in the *Ministers Life* case. The amicus brief in *Ministers Life* has been served on appellants and we incorporate said brief by this reference.

Appellants' attempt to distinguish *Ministers Life* on the ground that "group leaders"—in effect, agents or representatives, were present in Wisconsin. (Jd. Statement, pp. 17-18.) However, as the briefs before this Court show, the *Ministers Life* case was not argued on this basis, all parties treating the case as one involving mail order regulation. Thus, the issue as presented by Ministers Life, at page 3 of its Jurisdictional Statement, is stated as:

> "Does Section 201.42 of the Wisconsin Statutes, enacted by Chapter 397 of the Wisconsin Laws of 1961, purporting to regulate and tax out-of-state insurance companies which transact insurance business with Wisconsin residents by mail and are not licensed in Wisconsin and have no offices, agents, employees or property within Wisconsin, violate the Constitution of the United States for any one of the following reasons:"

Neither the Wisconsin nor the California Supreme Court treated the outcome of *Ministers Life* as resting on the presence of group leaders, such leaders being considered only an additional contact to be weighed along with other contacts in testing the validity of local regulation of mail order insurance. *Ministers Life and Casualty Union v. Haase, supra,* 141 N.W. 2d 287, 295; *People v. United National Life Ins. Co.,* 66 A.C. 602, 619, 58 Cal. Rptr. 599, 610, 427 P. 2d 199, 210 (1967). And, as pointed out by the California Supreme Court, the contacts with California of the appellants in this case are numerous and substantial. 66 A.C. at 618-619, 58 Cal. Rptr. at 609-10, 427 P. 2d at 209-210. Since *Ministers Life* was argued as a mail order case, and decided as such by the Wisconsin Supreme Court, and since this Court dismissed the appeal for want of a substantial federal question, *Ministers Life* is controlling here, and likewise, the instant appeal should be dismissed.

B. National Bellas Hess Does Not Overrule or Conflict With Ministers Life.

In an attempt to extricate themselves from the effect of this Court's decision in the *Ministers Life* case, appellants argue that the decision in *National Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753, is in conflict with, and controlling over, the decision in *Ministers Life.* (Jd. Statement, pp. 18-20.)

National Bellas Hess involved the validity of an Illinois statute requiring an out-of-state mail order retailer to collect Illinois use tax on goods sent into Illinois. The tax was viewed by this Court as an undue impediment on interstate commerce, since National en-

joyed no protection from local government and, therefore, could not be taxed to support local government. (386 U.S. 753, 759-60.) The question involved in *National Bellas Hess*, therefore, was purely one of taxation, and not of regulation of a business for the protection of the public health, welfare, and morals, such as involved here and in *Ministers Life*. This distinction is a vital one and has been long recognized by this Court.

In *Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949), this Court said:

> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." "Taxation that threatens interstate commerce with prohibition or discrimination is bad, Nippert v. Richmond, 327 U.S. 416, 434, but regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason." *Breard v. Alexandria*, 341 U.S. 622, 638 (1951).

This case, as *Ministers Life*, primarily involves regulation of policies sold to local residents by out-of-state mail order insurance companies. No attempt to tax for bare economic advantage or discrimination is involved. There is no taxation without regulation, but only regulation equal and coextensive with that of purely local insurers. Such nondiscriminatory regulation, imposed by requiring a certificate of authority, does not unduly

burden interstate commerce, nor does it violate due process *Robertson v. California,* 328 U.S. 440, 457-61 (1946); *Breard v. Alexandria, supra.*

The same issues urged here as grounds for invalidating local regulation were urged in the *Robertson* and *Ministers Life* cases, and in both of those cases, the local regulations were upheld. Therefore, those cases are controlling here.

We have no quarrel with the decision in *National Bellas Hess,* for we are not here attempting taxation without regulation. What we have here is a comprehensive system of equal regulation of all insurers, foreign as well as local. Therefore, *National Bellas Hess* is not applicable to the instant case.

As they have done with *Ministers Life,* appellants would no doubt attempt to distinguish *Robertson* on the basis that there, an agent was present in the state, whereas here, no agents are present in California. But *Robertson* does not say that the foreign insurer is subject to regulation because it had an agent in the state. *Robertson* holds that the agent is subject to regulation because the foreign insurer itself is subject to regulation:

> "It would be idle to require licensing of insurance agents, in order to secure honesty and competence, yet to place no restraint upon the kind of insurance to be sold or the kinds of companies allowed to sell it, and then to cover their representatives with their immunity. . . ." (328 U.S. at 457.)
>
> "It is quite obvious . . . that if appellant's contentions were accepted and foreign insurers were to be held free to disregard California's reserve requirements and then to clothe their agents or others

acting for them with their immunity, not only would the state be made helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. . . ." (328 U.S. at 459-60.)

That *Robertson* and *Ministers Life* support the local regulation of mail order insurance, and that *National Bellas Hess* invalidates only taxation which is unrelated to nondiscriminatory local regulation, is shown by *Fairfax Family Fund, Inc. v. California,* 382 U.S. 1 (1965). There, regulation by California of a purely mail order small loan company was upheld, under the *Robertson* case, as against the contention that such regulation was an undue burden on interstate commerce. While *Fairfax* involved only a Commerce Clause question, both *Robertson* and *National Bellas Hess* indicate that the Due Process and Commerce Clause limitations are coextensive. (*Robertson v. California, supra,* 328 U.S. 440, 461; *National Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753, 756; Jd. Statement, p. 19.) Since *Robertson* is a pre-McCarran Act case, it is fair to say that, even by pre-McCarran Act standards, the Due Process and Commerce Clause limitations, as applied to the regulation of mail order insurance, are coextensive. Therefore, if *Robertson,* a pre-McCarran Act case, supports the regulation of mail order small loan companies as against challenge under the Com-

merce Clause, it must also support such regulation under the Due Process Clause, and by direct analogy to *Fairfax,* it must support the regulation of mail order insurance under both clauses.[1] Any attempt to distinguish *Robertson* or *Ministers Life* on the basis that the insurance businesses there were not purely of a mail order nature must fail because of *Fairfax* in which purely mail order regulation was upheld on the basis of *Robertson.*

Conclusion.

We cannot and do not believe that the Due Process Clause, the Commerce Clause, or the McCarran Act prevent California from providing its citizens with the protection offered by the California Insurance Code, simply because appellants do their business by mail. On the basis of the *Robertson* case, and the *Ministers Life* case, and for the reasons urged here and in appellee's amicus brief in *Ministers Life,* we respectfully request that the appeal be dismissed for want of a substantial federal question.

Respectfully submitted,

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Attorney General,
H. WARREN SIEGEL,
Deputy Attorney General,
Attorneys for Appellee.

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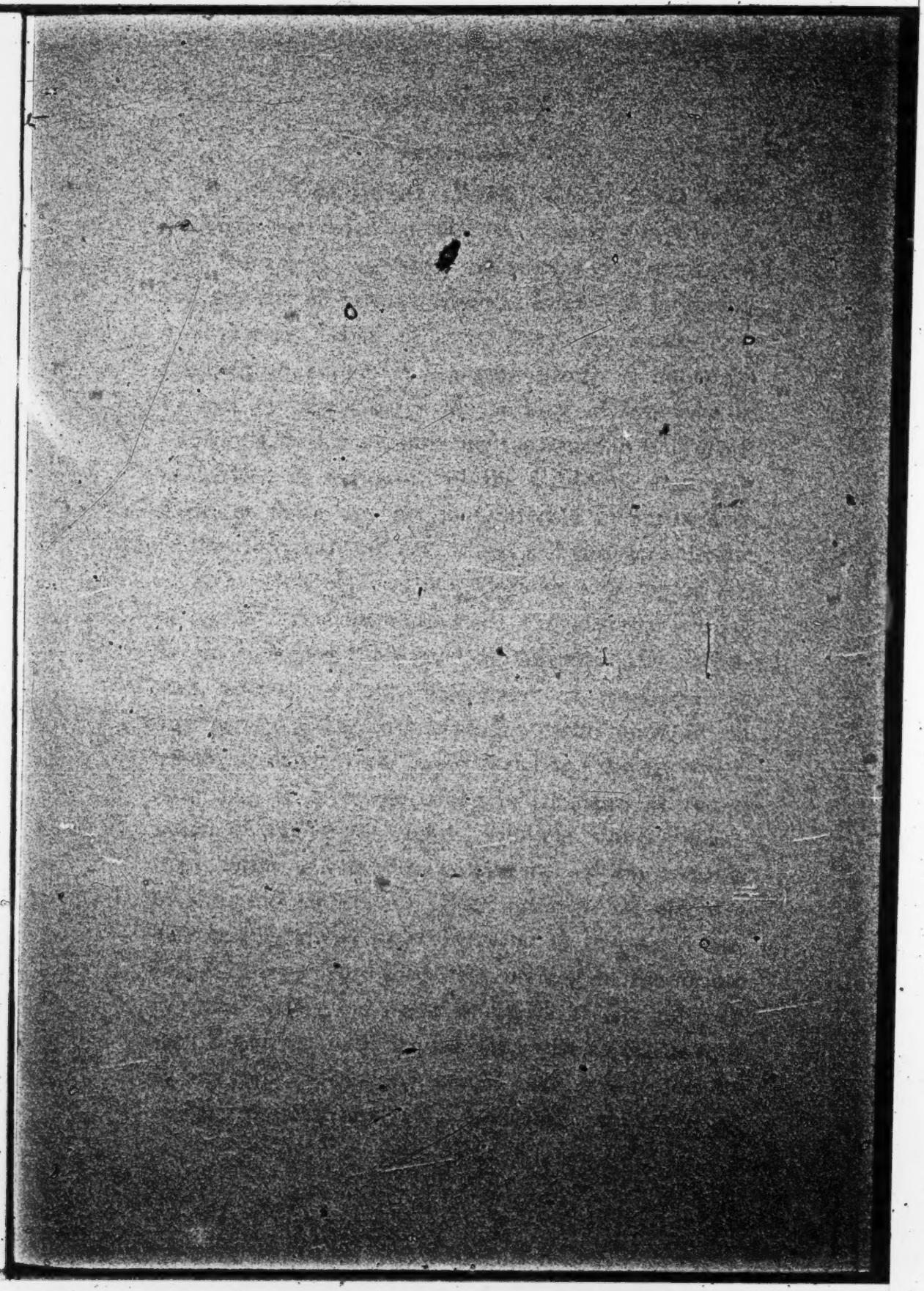
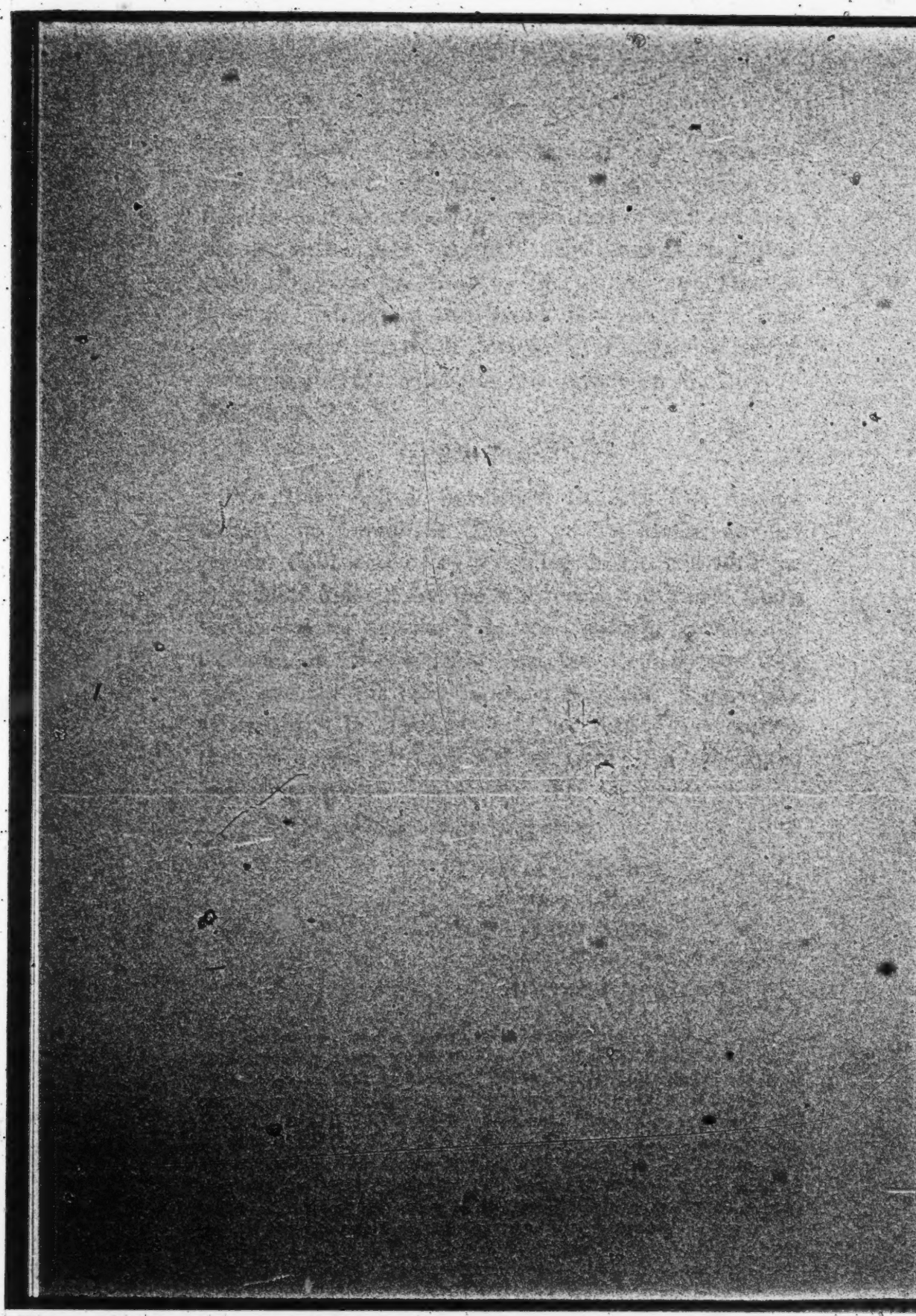
[1]The analogy of the insurance business to the lending business is compelling since, prior to *United States v. Southern Underwriters Assn.*, 322 U.S. 533 (1944), neither insurance nor loan contracts were considered to be commerce. *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1868); *Standard Home Co. v. Davis,* 217 F. 904, 915 (D.C.E.D. Ark. 1914). Thus, if *Robertson,* decided after *Southeastern Underwriters* but before the McCarran Act, supports the local regulation of the interstate mail order lending business, it must also support the pre-McCarran Act local regulation of the interstate mail order insurance business.





APPENDIX I.

Injunction.

IT IS ORDERED, ADJUDGED AND DECREED that defendant and its successors in interest, and its agents, servants, representatives, employees, and any and all persons acting in concert or in participation or on behalf of it or them, are hereby permanently enjoined from engaging directly or indirectly, by mail or otherwise, in the business of insurance in California, or from transacting insurance in California, as defined in section 35 of the California Insurance Code, or doing any act in California in furtherance of the aforementioned acts, unless and until a certificate of authority is obtained in compliance with section 700 of the California Insurance Code. Provided that nothing herein contained shall preclude defendant, its successors, agents, servants, representatives, employees, or any person acting in concert or participation or on behalf of it or them from honoring, giving notice, enforcing, or otherwise acting in pursuance or recognition of any of the rights, privileges, duties, obligations, terms or conditions arising out of any contract of insurance either (1) issued prior to the effective date hereof, or (2) issued hereafter to an insured outside California (provided, that nothing in this clause (2) shall affect the rights or duties of any party to such a contract under the law otherwise applicable to it at any time). Nothing herein shall permit the defendant to solicit any new or additional contract of in-

surance, or conversion thereto, except that defendant may answer any inquiries and send any notices regarding conversion rights or privileges.

For plaintiff's costs of suit herein in the amount of $.....

Dated: August 18, 1967.

Richard L. Wells
Judge of the Superior Court

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No. 669

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED NATIONAL LIFE INSURANCE COMPANY,
PIONEER LIFE INSURANCE COMPANY and
NATIONAL LIBERTY LIFE INSURANCE COMPANY,
Appellants,

v.

STATE OF CALIFORNIA, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

REPLY TO MOTION TO DISMISS

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1. Appellee's motion to dismiss rests essentially on the proposition that this case is controlled by *Ministers Life & Cas. Union* v. *Haase,* 385 U.S. 205. As has been shown in our Jurisdictional Statement, the *Ministers* case involved a controlling factual difference from the

present case. Appellee's only response to this proposition is to claim that the appellant in the *Ministers* case did not stress the factual difference referred to. This circumstance is irrelevant. It is hardly surprising that the appellant in *Ministers* sought to minimize the significance of its use of local "group leaders." The fact of their use was given substantial stress in the opinion of the Wisconsin Supreme Court (see 30 Wis. 2d at 348, 358-59, 141 N.W. 2d at 290, 295), and in the motion to dismiss filed in that case (see *Ministers* Motion, p. 6).

The question whether this Court's decision in *Ministers* is grounded in the facts of that case or represents a summary espousal of a far broader principle must, of course, ultimately be answered by this Court. We suggest that it seems unlikely that this Court intended to overturn a longstanding limitation on state power over the mail order insurance industry by the summary disposition of a case involving facts that brought the case well within the ambit of existing precedents. We also suggest that if the decision in *Ministers* is to be extended to sanction state taxation and regulation solely on the basis of an insurance company's use of the interstate mails, the extension deserves plenary consideration by this Court.

2. Contrary to the statement in the motion to dismiss (p. 4), appellants do not contend that *Ministers* conflicts with or has been overturned by the more recent decision in *National Bellas Hess* v. *Dept. of Revenue,* 386 U.S. 753. On the contrary, it is only when *Ministers* is read as appellee would read it that an apparent conflict with *National Bellas Hess* appears. We submit that *Ministers* and *National Bellas*

Hess—along with the numerous other decisions cited in the Jurisdictional Statement—point to a single conclusion: that the controlling test, disregarded by the California Supreme Court, is whether agents or representatives are present in the jurisdiction that seeks to tax and regulate.

Appellee's suggestion that *National Bellas Hess* is irrelevant because it allegedly involved a question of taxation whereas California's statutory regime is primarily one of regulation finds no support in the authorities. Two of the precedents that Congress made controlling in adopting the McCarran-Ferguson Act—*Allgeyer* v. *Louisiana,* 165 U.S. 578, and *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U.S. 346—treat the respective state statutes in those cases as governed by identical legal principles although one involved regulation and the other a tax, and the House Report on the McCarran-Ferguson Act refers to taxation and regulation without any suggestion of differentiation between them.[1]

Appellee's argument based on isolated sentences from *Hood & Sons* v. *Du Mond,* 336 U.S. 525, and *Breard* v. *Alexandria,* 341 U.S. 622, falls when the passages quoted are read in context. The Court in those cases was distinguishing not between taxation and regulation but between state action that discriminates against or prohibits interstate commerce and that directed to a less invidious end. Both cases involved regulation of business operations carried on by agents within the state. Hence, unlike the present case, the requisite jurisdictional nexus for state regulation plainly existed

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[1] H.R. Rep. No. 143, 79th Cong., 1st Sess. 3, quoted in Jurisdictional Statement, p. 11, n. 12.

in each instance and the only question was whether the discriminatory impact of the regulation on interstate commerce invalidated the regulatory scheme.

Even if the tax-regulation distinction pressed by appellee were accepted, it would be of no help to appellee here. For on the one hand, the statute struck down in *National Bellas Hess* did not purport to tax the appellant in that case, but rather to regulate it by compelling it to collect a tax from others — admittedly subject to the state's jurisdiction—on behalf of the state. And on the other, there is concededly here at issue California's authority to tax appellants as well as its authority to regulate them.

3. Finally, appellee attempts to support its contention that a state has plenary power to tax and to regulate mail order insurance companies that have no agents, representatives, offices or property within the state but conduct their business solely through the mails by reference to two decisions of this Court which have no real relevance to the issue here presented. The case principally relied on, *Robertson* v. *California*, 328 U.S. 440, was not even referred to by the California Supreme Court, and for good reason. *Robertson* upheld the validity of two California statutes requiring that insurance agents operating within the state obtain licenses from the Insurance Commissioner and abstain from representing unauthorized insurers. Appellee seeks to bring the decision to bear on the instant case by suggesting that its underlying rationale is "that the agent is subject to regulation because the foreign insurer itself is subject to regulation" (p. 6).

A reading of the *Robertson* opinion makes evident that appellee's suggestion is without foundation. The case does not hold that a local insurance agent is subject to state regulation because his foreign principal is subject to such regulation. The language relied upon by appellee was used by the Court in rejecting the argument that a local agent was immune from state regulation because the regulation of his foreign principal would be beyond state power—an argument that ignored the fact that this Court has consistently held a foreign principal with local agents to be subject to the power of the state.

To the extent that the language in *Robertson* has any relevancy here it indicates merely that a foreign insurer which chooses to enter a state by employing agents there subjects itself to the regulatory jurisdiction of the state. Were *Robertson* in fact based on any theory like that pressed by appellee the case would necessarily have required discussion in *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, and indeed would appear to have compelled a contrary result in that case. As in the case of *Ministers,* appellee seeks to gain support from the *Robertson* decision by adding new theories and subtracting limiting facts.

The other case referred to by appellee, *Fairfax Family Fund, Inc.* v. *California,* 382 U.S. 1, is not in point because it involved state power to regulate a loan company, not an insurance company. That power is unconstrained by the McCarran-Ferguson Act and thus is not governed by constitutional principles as they had been enunciated in 1945 but rather by the more expansive standards of today.

The motion to dismiss should be denied and probable jurisdiction noted.

Respectfully submitted,

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October 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

UNITED NATIONAL LIFE INS. CO. ET AL. *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 669. Decided December 11, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted and the case assigned for oral argument.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.